# Lecture Notes

# On

# Legal Aspects of Business

## MBA First Year, Second Semester

## (MBA -207)

**Mr.Shailendra Kumar Srivastava**

**Assistant Professor**

**Department of Business Studies**

**NEHRU GRAM BHARATI DEEMED TO BE UNIVERSITY, PRAYAGRAJ**

**Course Credits: 3** **Contact Hours: 38**

**Unit 1**

Law of Contract: Definition, essentials and types of contracts, offer – definition and essentials, acceptance – definition and essentials, consideration – definition and essentials, exceptions to the rule, no consideration, no contract, doctrine of privity of contract, capacity of parties, free consent, quasi contract, legality of object, performance of contract, termination of contract, remedies for breach of contract. Law of Agency: Essentials, kinds of agents, rights and duties of agent and principal, creation of agency, termination of agency. (6 Hours)

**Unit 2**

Negotiable instruments act 1881, Nature and characteristics of Negotiable instruments, kinds of negotiable instruments – promissory notes, bills of exchange and cheques. Parties to negotiable instruments, Negotiation, presentment, discharge and dishonor of negotiable instruments. Law of partnership: Definition, essentials of partnership, formation of partnerships, kinds of partners, authorities, rights and liabilities of partners, registration of partnership, dissolution of partnership firm. (8 Hours)

**Unit 3**

Companies Act: definition, characteristics and kinds of companies, steps in formation of company. Memorandum of association, articles of association, prospectus. Directors: appointment, power, duties and liabilities, meeting and resolutions: types of meetings. Auditor: appointment, rights and liabilities. modes of winding up of a company. (8 Hours)

**Unit 4**

Sale of goods Act: Essentials, sale v/s agreement to sell. Condition v/s warranties, rights of unpaid seller. Consumer Protection Act: Objectives, definition, consumer protection council and state consumer protection council. (8 Hours)

**Unit 5**

The Information Technology Act, 2000:Definition, Digital Signature, Electronic Governance, Attribution, Acknowledgment and Dispatch of Electronic Records, Sense Electronic Records and Sense Digital Signatures, Regulation of Certifying Authorities, Digital Signature Certificates, Duties of Subscribers, Penalties and Offences. The Right to Information Act, 2005: Right to know, Salient features of the Act, obligation of public Authority, Designation of Public Information officer, Request for obtaining information, Duties of a PIO, Exemption from disclosure of information, Partial disclosure of information, In formation commissions, powers of Information Commissions, Appellate Authorities, Penalties ,Jurisdiction of courts. (8 Hours)

# UNIT-1

**Law of Contract: Definition, essentials and Types of Contract**

A contract is an agreement made between two or more parties which the law will enforce.

Sec 2(h) defines contract "as an agreement enforceable by law".

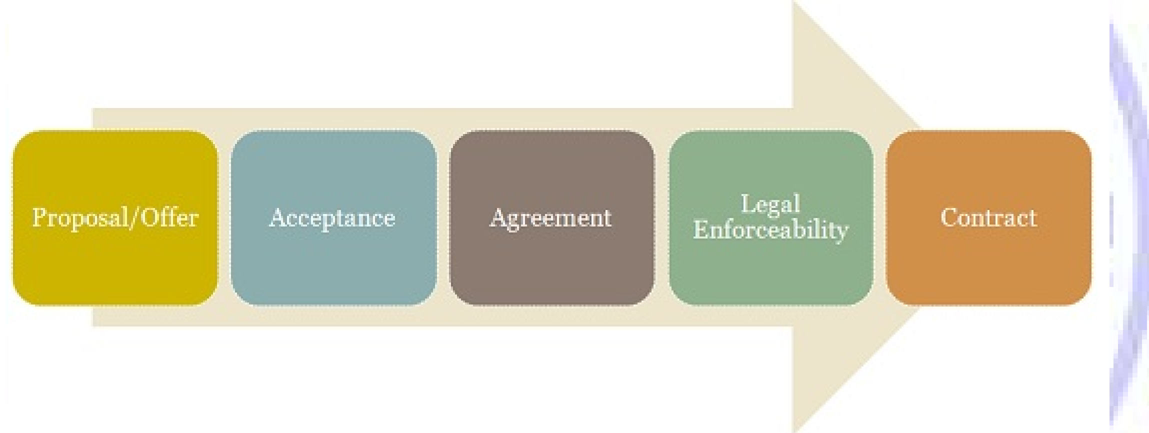
**Contract=Agreement + Enforceability at law**.

**Agreement**

Agreement is defined as "every promise and every set of promises, forming consideration for each other".

Promise= a proposal when accepted becomes a promise.

Agreement = Offer+ Acceptance




**Consensus Ad Idem**

The parties to the agreement must have agreed about the subject matter of the agreement in the same sense and at the same time.

Unless there is consensus ad idem, there can be no contract.

**Enforceable by law**

An agreement, to become a contract, must give rise to a legal obligation or duty.

An agreement may be social agreement or legal agreement.

But only those agreements which are enforceable in a court of law are contracts.

**"All contracts are agreements, but all agreements are not necessarily contract"**

**Essential elements of a Valid Contrac**

1. Offers and Acceptance
2. Legal Relationship
3. Lawful Consideration
4. Capacity of Parties
5. Free Consent
6. Lawful Objects
7. Writing and Registration
8. Certainty
9. Possibility of Performance
10. Not Expressly Declared Void

**1. Offers and Acceptane**

It is one of the essentials of valid contract. There must an offer and acceptance of the same.

2. **Legal Relationship**

The parties to an agreement must create legal relationship. Agreements of a social or domestic nature do not create legal relations and as such cannot give rise to a contract

Example, X invited Y to a dinner Y accepted the invitation. It is a social agreement. If X fails to serve dinner to Y, Y cannot go to the courts of law for enforcing the agreement.

3. **Lawful Consideration**

Consideration is "something in return." Consideration has been defined as the price paid by one party for the promise of the other. Example,: X agrees to sell his motor bike to Y for Rs. 1,00,000. Here Y's promise to pay Rs. 1, 00,000 is the consideration for X's promise to sell

the motor bike and X's promise to sell the motor bike is the consideration for Y's promise to pay 1, 00,000.

4. **Capacity of Parties**

   It means that the parities to an agreement must be competent to contract. A contract by a person of unsound mind is void ab-initio. Thus, a contract entered into by a minor or by a lunatic is void.

   **Example:** X a minor borrowed Rs 8,000 from Y and executed mortgage of his property in favour of the lender. This was not a valid contract because X is not competent to contract.

5. **Free Consent**

   For a valid contract it is necessary that the consent of parties to the contact must be free.

   **Example:** X threatens to kill Y if he does not sell his car to X. Y agrees to sell his car to X. In this case, Y's consent has been obtained by coercion and therefore, it cannot be regarded as free.

6. **Lawful Objects**

   It is also necessary that agreement should be made for a lawful object. Every agreement of which the object or consideration is unlawful is illegal and the therefore void.

7. **Writing and Registration**

   According to Contract Act, a contract may be oral or in writing. Although in practice, it is always in the interest of the parties that the contract should be made in writing so that it may be convenient to prove in the court.

8. **Certainty**

   For a valid contract, the terms and conditions of an agreement must be clear and certain.

9. **Possibility of Performance**

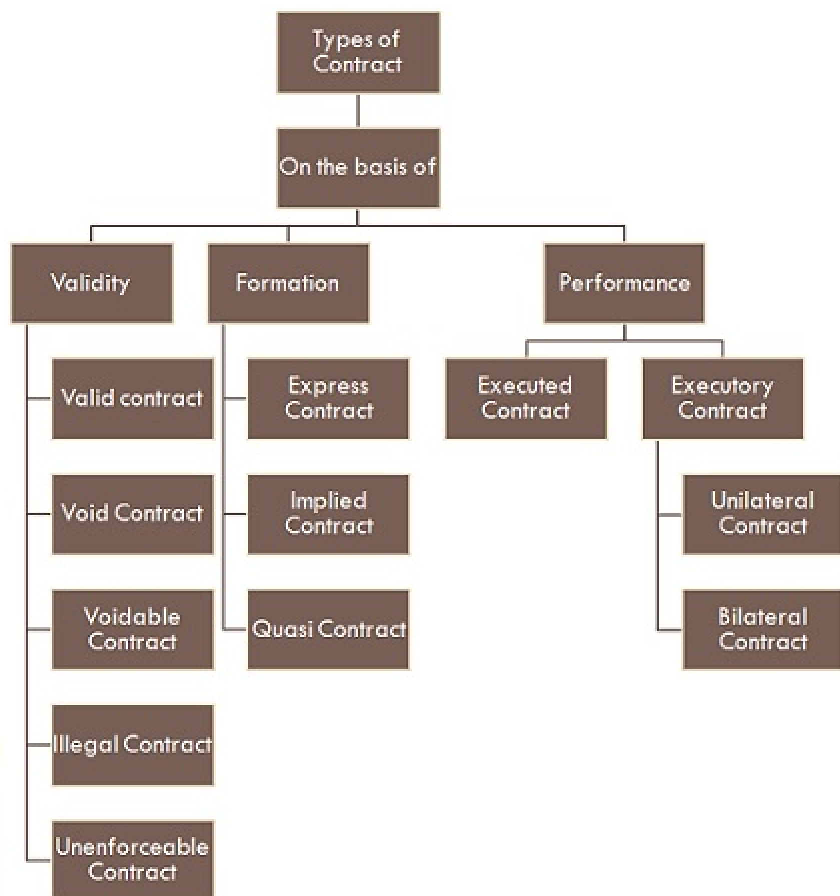
   If the act is legally or physically impossible to perform, the agreement cannot be enforced at law.

   **Example:** A agrees with B to discover treasure by magic and B agrees to pay Rs 1,000 to A. This agreement is void because it is an agreement to do an impossible act.

10. **Not Expressly Declared Void**

    An agreement must not be one of those, which have been expressly declared to be void by the Act.

**Kinds of Contract**




Contracts may be classified as follows:

1. ***On the basis of enforceability***

   (a) Valid Contracts.

   (b) Void Contracts.

   (c) Voidable Contracts. (d) Illegal Contracts.

   (e) Unenforceable Contracts.

2. ***On the basis of mode of creation***

   (a) Express Contracts

   (b) Implied Contracts.

3. ***On the basis of the extent of execution***

   (a) Executed Contracts

   (b) Executory Contracts.

**Valid contract:** The Contracts which are enforceable in a court of law are called Valid Contracts.

**Voidable Contract:** If one party to the contract has the option of enforcing a contract by law, but not at the option of the other or others, it is a voidable contract.

**Void contract**: An agreement may be enforceable at the time when it was entered into but later on,due to certain reasons, for example impossibility or illegality of the contract, it may become void and unenforceable.

**Illegal contract:** If the contract has unlawful object it is called Illegal Contract.

Example: There is a contract between X and Z according to which Z has to murder Y for a consideration of Rs. 10000/- from X. It is illegal contract.

**Unenforceable contract:** A contract which has not properly fulfilled legal formalities is called unenforceable contract. That means unenforceable contract suffers from some technical defect like insufficient stamp etc. After rectification of that technical defect, it becomes enforceable or valid contract.

Example: A and B have drafted their agreement on Rs. 10/- stamp where it is to be written actually on Rs. 100/- stamp. It is unenforceable contract.

***All illegal Contracts are void, but all void contracts are not illegal***

**Express contract** – Where the offer or acceptance of any promise is made in words, the promise is said to be express. For example: A has offered to sell his house and B has given acceptance. It is Express Contract.

**Implied contract** – An implied contract is one which is inferred from the acts of the parties or course of dealings between them. Sitting in a Bus can be taken as example to implied contract between passenger and owner of the bus.

**Quasi Contract:** In case of Quasi Contract there will be no offer and acceptance so, actually there will be no Contractual relations between the partners. Such a Contract which is created by Virtue of law is called Quasi Contract.

**Executed contract** – In a contract where both the parties have performed their obligation.

**Unilateral contract** – In a contract one party has performed his obligation and other person is yet to perform his obligation.

**Bilateral contract** – It is a contract where both the parties are yet to perform their obligation. Bilateral & Executory are same and inter – changeable.

**Offer: Definition and essentials**

**A contract is initiated by an offer or proposal**. For this purpose, when a contract is formed between two or more parties, the person making the offer is known as the promisor and the person accepting the same is known as an acceptor. An offer so tabled for the acceptance of the recipient must be valid. In this article, we look at the elements of a valid offer in detail.

When a person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the ascent of that other to such act or abstinence he is said to make a proposal. – Section 2 (a) of Indian Contract act.

Express or Implied

An offer can be tabled through words or conduct. An offer made through words (which could be written or spoken), is known as an express contract, whereas the ones addressed through the conduct and actions of the offeror is known as an implied contract.

Legal Relations

An offer is made for the execution of a contract between two or more parties. In this respect, it prompts for the creation of legal relations and legal consequences (in case of non-performance). It is pertinent to note that a social contract without the establishment of legal relations will not constitute a valid offer.

Clarity Matters

An offer must be definite and clear, without which a binding contract isn't created. A contract of such kind is considered to be void. To state as provided in the respective legal provision, "Agreements, the meaning of which is not certain or capable of being certain are void."

It is Not an Invitation to Offer

An invitation to offer merely invites the other party for an offer but doesn't make it. To reiterate, the sender of the invitation intimates the receiver that he/she/it intends to deal with anybody who is willing to negotiate, after duly considering the information furnished in the invite. Communications falling under this category doesn't constitute an offer.

Specific or General

Offers may be specific or general, and both of these are construed as valid. It may be noted though that if an offer is made to a specific person or for that matter a group of persons, it is termed as specific and can only be accepted by the person to whom it is made. On the other hand, an offer made to the public is termed as general, and such an offer can be accepted by any person who fulfils the specified conditions.

Communication of Offer

An offer stated by the offeror must be clear in its communication so as to facilitate acceptance. Lack of clarity will result in the voidance of the offer made.

Conditional Offer

An offer has scope to be conditional, though an acceptance hasn't. The person making the offer may include any compliance requirements if deemed necessary. However, an offer shouldn't have a condition which demands the recipient to accept a one-sided offer. For instance, an offeror cannot state in an offer that a proposal is deemed to be accepted if no response is filed within a given timeline.

No Scope for Cross Offers

Cross-offers take place when two parties make similar offers to each other by ignoring the offer from the other end. The acceptance of cross offers doesn't make for a complete agreement. This is precisely because if the parties furnish an offer as acceptance of the other, it will potentially lead to issues in the performance of the contract.

**Acceptance: Definition and essentials**

When the person to whom the proposal is made, signifies his ascent there to, the proposal (offer) is said to be accepted. A proposal (offer) when accepted becomes a Promise.

**Essentials of Valid Acceptance**

1. **Acceptance must be given by that person only to whom the offer is made:**

   An acceptance to be valid must be given only by a person to whom offer has been given. In other words, acceptance must move from the offeree and no one else.

2. **Acceptance must be communicated:**

   Offeree has to communicate his acceptance to offerer.

3. **The acceptance must be given within the time prescribed or within a reasonable time:**

   Sometimes, the time limit is fixed within which an acceptance is to be given. In such cases, the acceptance must be given within the fixed time limit. In case, no time is prescribed, the acceptance should be given within a reasonable time. The term 'reasonable time' depends upon the facts and circumstances of each case.

4. **Acceptance must be Un-Conditional:**

   It is another important essential element of a valid acceptance. A valid contract arises only if the acceptance is absolute and unconditional. It means that the acceptance should be in total and without any condition.

6. **Acceptance must be communicated in the method specified by offerer:**

   When an offer is made for the same, acceptance must be communicated in the method specified by offerer.

7. **The acceptance must be given before the lapse of offer:**

A valid contract can arise only when the acceptance is given before the offer has elapsed or withdrawn. An acceptance which is made after the withdrawal of the offer is invalid, and does not create any legal relationship

8. **The acceptance must be communicated:**

   It is an important and essential element of a valid acceptance.

**Consideration-Definition and essentials**

***When a party to an agreement promises to do something, he must get "something" in return .This "something" is defined as consideration.***

***The essentials or legal rules of a valid consideration are as under:-***

1. **It must move at the desire of the promisor:**

   In order to constitute legal consideration the act or abstinence forming the consideration for the promise must be done at the desire or request of the promisor.

   Example:

   X saves Y's house from the fire without being asked to do so. X cannot demand payment for his services because X performed this act voluntarily and not at the desire of Y.

2. **It may move from the Promisee or any other person:**

   The second essential of a valid consideration is that consideration may move from the promisee or from a third person on his behalf.

   [Chinnaya v. Ramayya ]

3. **It may be past, present or future:**

   Consideration may be past present or future.

   A) Past Consideration:

   When the consideration for a present promise was given before the date of the promise it is called a past consideration. It is not a valid consideration.

   B) Present Consideration:

   When consideration is given simultaneously by one party to another at the time of contract, it is called Present Consideration. The act constituting the consideration is wholly or completely performed.

Example:

A sells a book to B and B pay its price immediately it is a case of present consideration.

C) Future Consideration:

When the consideration on both sides is to be given at a future date, it s called future consideration or executory consideration. It consists of promises and each promise is a consideration for the other.

4. **It need not be Adequate:**

It is not necessary that consideration should be adequate to the value of the promise. The law only insists on the presence of consideration and not on its adequacy. It is for the parties to the contract to consider the adequacy of consideration and the courts are not concerned about it.

Example:

A agrees to sell his car worth Rs.20000 for Rs.5000 only and his consent is free. The agreement is valid contract.

5. **It must be real:**

It is necessary that consideration must be real and competent. Example:

A promise to put life in X's dead body on B's promise to pay him Rs.1000. It is not real.

**Exception to the Rule**

Consideration being one of the essential elements of a valid contract, the general rule is that "an agreement made without consideration is void." But there are a few exceptions to the rule, where an agreement without consideration will be perfectly valid and binding. These exceptions are as follows:

1. **Agreement made on account of natural love and affection [Sec. 25(1)]:**

An **agreement** made without consideration is enforceable if, it is (i) expressed in writing, and (ii) registered under the law for the time being in force for the registration of documents, and is (iii) made on account of natural love and affection, (iv) between parties standing in a near relation to each other. Thus there are four essential requirements which must be complied with to enforce an agreement made without consideration, as per Section 25(1).

**Illustrations:**

(a) A promises, for no consideration, to give to B Rs 1,000. This is a void agreement.

(b) A for natural love and affection, promises to give his son B, Rs 1,000. A puts his promise to B into writing and registers it. This is a contract.[12] It should, however, be noted that mere existence of a near relation between the parties does not necessarily import natural love and affection.

Thus where a Hindu husband, after referring to quarrels and disagreement between him and his wife, executed a registered document in favour of his wife, agreeing to pay for separate residence and maintenance, it was held that the agreement was void for want of consideration because it was not made out of natural love and affection. (Rajlakhi Devi vs Bhootnath)

2. **Agreement to compensate for past voluntary service:**

A promise made without consideration is also valid, if it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or done something which the promisor was legally compellable to do.

**Illustrations:**

(a) A finds B's purse and gives it to him. B promises to give A Rs 50. This is a contract.

(b) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract[14] (Note that B was legally bound to support his infant son.)

(c) A rescued B from drowning in the river, and B, appreciating the service that has been rendered, promises to pay Rs 1,000 to A. There is a contract between A and B.

In order to attract this exception, it should be noted that the promise must be to compensate a person who has himself done something for the promisor and not to a person who has done nothing for the promisor.

Thus, where B treated A during his illness but refused to accept payment from A; they being friends; and A in gratitude promises to pay Rs 1,000 to B's son D, the agreement between A and D is void for want of consideration as it is not covered under the exception.

3. **Agreement to pay a time-barred debt:**

Where there is an agreement, made in writing and signed by the debtor or by his authorised agent, to pay wholly or in part a debt barred by the law of limitation, the agreement is valid even though it is not supported by any consideration.

A time barred debt cannot be recovered and therefore a promise to repay such a debt is without consideration, hence the importance of the present exception.

**But before the exception can apply, it is necessary that:**

(i) The debt must be such of which the creditor might have enforced payment but for the law for the limitation of suits;

(ii) The promisor himself must be liable for the debt. So a promissory note executed by a widow in her personal capacity in payment of time barred debt of her husband cannot be brought within the exception (Pestonji vs Maherbai); and

(iii) The promise must be in writing and signed by the debtor or his agent. An oral promise to pay a time-barred debt is unenforceable:

The logic behind this exception is that by lapse of time the debt is not destroyed but only the remedy is lost. The remedy is revived by a new promise under the exception.

**Illustration:**

A owes Rs 1,000, but the debt is barred by the Limitation Act. A signs written promises to pay B Rs 500 on account of the debt. This is a contract (Appended to Sec. 25).

4. **Completed gift:**

   A gift (which is not an agreement) does not require consideration in order to be valid. "As between the donor and the done, any gift actually made will be valid and binding even though without consideration" [Explanation 1, to Section 25].

   In order to attract this exception there need not be natural love and affection or nearness of relationship between the donor and done. The gift must, however, be complete.

5. **Contract of agency:**

   Section 185 of the Contract Act lies down that no consideration is necessary to create an agency.

6. **Remission by the promisee, of performance of the promise:**

   For compromising a due debt, i.e., agreeing to accept less than what is due, no consideration is necessary. In other words, a creditor can agree to give up a part of his claim and there need be no consideration for such an agreement. Similarly, an agreement to extend time for performance of a contract need not be supported by consideration.

7. **Contribution to charity:**

   A promise to contribute to charity, though gratuitous, would be enforceable, if on the faith of the promised subscription, the promisee takes definite steps in furtherance of the object and undertakes a liability, to the extent of liability incurred, not exceeding the promised amount of subscription.

   In Kedar Nath vs Gorie Mohammad, the defendant had agreed to subscribe Rs 100 towards the construction of a Town Hall at Howarh. The plaintiff (secretary of the Town Hall) on the faith of the promise entrusted the work to a contractor and undertook liability to pay him.

The defendant was held liable. But where the promisee had done nothing on the faith of the promise, a promised subscription is not legally recoverable.

Accordingly, in Abdul Aziz vs Masum Ali the defendant promised to subscribe Rs 500 to a fund started for rebuilding a mosque but no steps had been taken to carry out the repairs.

The defendant was held not liable and the suit was dismissed. It may thus be noted that consideration need not always be something in return. It may even take the form of some risk, loss or responsibility suffered or undertaken by one party (Currie vs Misa).

**No Consideration, No Contract**

Consideration being one of the essential elements of a valid contract the general rule is that "an agreement made without consideration is void. But there are a few exceptions to the rule, where an agreement without consideration will be perfectly valid and binding. These exceptions are as follows:

1. **Agreement made on account of natural love and affection**[Sec. 25 (1)]: An agreement made without consideration is enforceable. If it is

(i) Expressed in writing

(ii) Registered under the law for the time being in force for the registration of documents

(iii) Is made on account of natural love and affection

(iv) Between parties standing in a near relation to each other.

Thus there are four essential requirements which must be complied with to enforce an agreement made without consideration, as per Section 25 (1).

Let us now study some some illustrations in this behalf

(a) A promises, for no consideration, to give to B Rs 1,000. This is a void agreement

(b) A for natural love and affection, promises to give his son B, Rs 1,000. A puts his promise to B into writing and registers it This is a contract.

(c) A registered agreement, whereby an elder brother, on account of natural love and affection, promised to a the debts of his younger brother, was held to be valid and binding an the younger brother cause the elder brother in the event of his not carrying out the agreement (Venkatasamy vs Rangasami)

It should, however, be noted that mere existence of a near relation between the parties does not necessarily import natural love and affection. Thus where a Hindu husband, after referring to quarrels and disagreement between him and his wife, executed a registered document in favour of his wife, agreeing to pay for separate residence and maintenance, it

was held that the agreement was void for want of consideration because it was not merely out of natural love, and affection. (Rajlakhi Devi vs Bhootnath)

2. **Agreement to compensate for past voluntary service (Sec.25 (2)].**

A promise made without consideration is also valid, if it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor,' or done something which the promisor was legally compelled to do.

**Illustrations**

(a) A finds B's purse and gives it to him. B promises to give A Rs 50. This is a contract.

(b) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract. (Note that B was legally bound to support his infant son).

(c) A rescued B from drowning in the river, and B, appreciating the service that had been rendered, promises to pay Rs 1,000 to A. There is a contract between A and B.

In order to attract this exception, the following points should be noted:

(i) The service should have been rendered voluntarily for the promisor. If it is not voluntary but rendered at the desire of the promisor, then it is covered under 'past consideration' [as per Sec. 2(d) and not under this exception].

(ii) The promisor must be in existence at the time the service was, rendered. Thus where services were rendered by a promoter for a company not then in existence, a subsequent promise by the company to pay for them could not be brought within the exception. (Ahmedabad JubileeSpinning Co. vs Chhotalal).

(iii) The promise must be to compensate a person who has himself done something for the promisor and not to a person who has done nothing for the promisor. Thus, where B treated A during his illness but refused to accept payment from A; they being friends; and A in gratitudepromises to pay Rs 1,000 to B's son D, the agreement between A and D is void for want. of consideration as it is not covered under the exception.

(iv) The intention of the promisor ought to be to compensate the promisee. A promise given for any motive other than the desire to compensate the promisee would not fall within the exception. (Abdulla Khan vs Parshottam)

(v) The promisor to whom the service has been rendered needed competence to contract at the time the service was rendered. Thus a promise- made after attaining majority to pay for goods supplied voluntarily to the promisor during his minority has been held valid and the promisee could enforce it ,(Karam Chand vs Basant Kaur).

The court in that case ob-served that they failed to see how an agreement made by a person of full age to compensate wholly or in part a promisee, who had already voluntarily done something for the promisor, even at a time when the promisor was a minor, did not fall within

the purview of Sec. 25(2) of the Contract Act. The reasoning of the court is, that at the time the thing was done the minor was unable to contract, and therefore the person who did. it for the minor must in law be taken to have done it voluntarily. In their opinion the 'provisions of Sec. 25(2) applied equally to a contract by a major, as well as by a minor, to pay for past services. In this connection it is important to note that this exception does 'not cover a promise by a person on attaining majority to repay the money borrowed during his minority because such a promise cannot be said to be a promise to compensate a person who has already voluntarily (without any promise of compensation) done something for the promisor. 'Advancing money as a loan' necessarily implies a promise to compensate *(i.e.,* a promise to repay the loan) on the part of the borrower, Thus apromise made by a minor after attaining majority to repay money advanced during his minority has been held invalid and beyond the purview of Section 25(2) of the Contract Act *(*Indran Ramaswami vs Anthappa).

(vi) The service rendered must also be legal. Thus past cohabitation will not make a promise to pay for it enforceable under this exception (Sabava vs Yamanappa).

3. **Agreement to pay a time-barred debt (Sec. 25 (3)].** Where there is an agreement, made in writing and signed by the debtor or by his authorised agent, to pay wholly or in part a debt barred by the law of limitation, the agreement is valid even though It is not supported by any consideration. A time barred debt cannot be recovered and therefore a promise to repay such a debt is without consideration, hence the importance of the present exception.

   But before the exception can apply, it is necessary that:

   *(*i) The debt must be such of which the creditor might' have enforced payment but for the law for the limitation of suits.

   (ii) The promisor himself must be liable for the debt. So a promissory note executed by a widow in her personal capacity in payment of time-' barred debt of her husband cannot be brought within the exception (Pestonji vs Maherbai28);

   (iii) There must be an 'express promise to pay' a time barred debt as distinguished from a mere 'acknowledgement of a liability' in respect of a debt. Thus. a debtor's letter to his creditor, "I owe you Rs. 1,000 on account of my time-barred promissory note" is not a contract. There must be adistinct promise to pay; and

   (iv) The promise must be in writing and signed by the debtor or his agent. An oral. promise to pay a time-barred debt is unenforceable.

   The logic behind this exception is that by lapse of time the debt is not destroyed but only the remedy is" lost. The remedy is revived by a new promise under the exception.

   **Illustration.** *A* owes *B* Rs 1,000, but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B Rs* 500 on account of the debt. This is Ii contract (Appended to Sec. 25).

4. **Completed gift.** A gift (which is not an agreement) does not require consideration in order to be valid "As between the donor and the done any lift actually made will be valid I and

binding even though without consideration" [Explanation 1, to Section 25]. In order to attract this exception there need not be natural love and affection or nearness of relationship between the donor and done. The gift must, however, be complete.

5. **Contract of agency.** Section 185 of the Contract Act lays down that no consideration is necessary to create an agency.
6. **Remission by the promisee,** of performance of the promise (Sec. 63). For compromising a due debt, i.e., agreeing to accept less than what is due, no consideration is necessary. In other words, a creditor can agree to give up a part of his claim and. there need be no consideration for such an agreement. Similarly, an agreement to extend time for performances of a contract need not be supported by consideration (Sec.63).
7. **Contribution to charities.** A promise to contribute to charity, though gratuitous, would be enforceable, if on the faith of the promised subscription, the promisee takes definite steps in furtherance of the object and undertakes a liability, to the extent of liability incurred, not exceeding the promised amount of subscription. In Kedar Nath vs Ghorie Mohammad, the defendant had agreed to subscribe Rs 100 towards the construction of a Town Hall at Howrah. The plaintiff (secretary of the Town Hall) on the faith of the promise entrusted the work to a contractor and undertook liability to pay him. The defendant was held liable. But where the promisee had done nothing on the faith on the promise, a promised subscription is not legally recoverable. Accordingly, in Abdul Aziz vs Masum Ali, the defendant promised to subscribe Rs 500 to a fund started for building, a Mosque but steps had been take to carry out the repairs. The defendant was held not liable and the suit was dismissed.

**Doctrine of privity of Contract**

As per the dictionary meaning privity of contract means:

Legal doctrine that a contract confers rights and imposes liabilities only on its contracting parties. They and not any third-party, can sue each other (or be sued) under the terms of the contracts. Privity is the legal term for a close, mutual, or successive relationship to the same right of property or the power to enforce a promise or warranty.

As per the legal definition of privity of contract:

The doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it.

The doctrine of privity of contract means that only those involved in striking a bargain would have standing to enforce it. In general this is still the case, only parties to a contract may sue for the breach of a contract, although in recent years the rule of privity has eroded somewhat and third party beneficiaries have been allowed to recover damages for breaches of contracts they were not party to. There are two times where third party beneficiaries are allowed to fall under the contract. The duty owed test looks to see if the third party was agreeing to pay a debt for the original party. The intent to benefit test looks to see if circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Any defense allowed to parties of the original contract extend to third party beneficiaries. A recent example is in England, where the Contract (Rights of Third Parties) Act 1999 was introduced.

Indian law is practically same as the English common law. However, under the Indian law 'consideration may move from the promisee or any other person .' In the chinnaya vs. rammayya case, an old lady by a deed of gift, gave over certain properties to her daughter under the direction that she should pay her aunt a certain sum of money. The same day the daughter refused to pay her aunt the money on the plea that no consideration has moved from her aunt to her. It was held that sister of the old lady (aunt) was entitled to maintain the suit as consideration had move from the old lady, for her sister to the daughter.

2. Who is a third party beneficiary

A third party beneficiary, in the law of contracts, is a person who may have the right to sue on a contract, despite not having originally been a party to the contract. This right arises where the third party is the intended beneficiary of the contract, as opposed to an incidental beneficiary. It vests when the third party relies on or assents to the relationship, and gives the third party the right to sue either the promisor or the promisee of the contract, depending on the circumstances under which the relationship was created.

In English law, the doctrine was not recognized at common law, but a similar concept was introduced with the Contracts (Rights of Third Parties) Act 1999.

In order for a third party beneficiary to have any rights under the contract, he must be an intended beneficiary, as opposed to an incidental beneficiary. The burden is on the third party to plead and prove that he was indeed an intended beneficiary.

A third party beneficiary, in the law of contracts, is a person who may have the right to sue on a contract, despite not having originally been a party to the contract. This right arises where the third party is the intended beneficiary of the contract, as opposed to an incidental beneficiary. It vests when the third party relies on or assents to the relationship, and gives the third party the right to sue either the promisor or the promisee of the contract, depending on the circumstances under which the relationship was created.

Intended beneficiary

An intended beneficiary is that one party – called the promisee – makes an agreement to provide some consideration to a second party – called the promisor – in exchange for the promisor's agreement to provide some product, service, or support to the third party beneficiary named in the contract. The promisee must have an intention to benifit the third party – but this requirement has an unusual meaning under the law. Although there is a presumption that the promisor intends to promote the interests of the third party in this way, if party A, contracts with party B, to have a thousand killer bees delivered to the home of A's worst enemy, party C, then C is still considered to be the intended beneficiary of that contract.

There are two common situations in which the intended beneficiary relationship is created. One is the creditor benificiary, which is created where A owes some debt to C, and A agrees to provide some consideration to B in exchange for B's promise to pay C some part of the amount owed.

The other is the donee beneficiary, which is created where A wishes to make a gift to C, and A agrees to provide some consideration to B in exchange for Bethany's promise to pay C the amount of the gift. Under old common law principles, the donee beneficiary actually had a greater claim to the benefits this created; however, such distinctions have since been abolished.

An incidental beneficiary is a party who stands to benefit from the execution of the contract, although that was not the intent of either contracting party. If the contract is breached by either party, an incidental third party has no rights to recover anything under the contract.

3. When can a third party overcome the doctrine of privity of contract?

A third party even though an intended beneficiary can over come the doctrine of privity of contract only when-

1. The parties to the contract have not otherwise agreed;
2. Recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and
3. The terms of the contract or the circumstances surrounding performance indicate that either-
4. the performance of the promise will satisfy an obligation or discharge a duty owed by the promisee to the beneficiary; or
5. the promisee intends to give the beneficiary the benefit of the promised performance."

Under Indian contract Act 1872 exceptions to the doctrine of privity of contract are contracts executed-

1. for natural love and affection
2. marriage partition and family disputes
3. time barred debt
4. trust, and
5. agency.

There are a number of general law principles which enable a third party, to overcome the doctrine of privity under English common law are-

(a) Agency

The rule here is that if one of the contracting parties contracts as an agent, then either the agent or the principal, but not both, can sue to enforce the contract. In our example, if B is C's agent then either B or C can enforce the contract against A. In these cases it is immaterial as to whether A knew that B was C's agent.

(b) Trusts

The law of trusts can enable a third party beneficiary to initiate action that will enforce the promisor's obligation. Using the above example, if B had contracted with A in the capacity of trustee for C, C as beneficiary under the trust has enforceable rights. These rights arise because the law of trusts gives a beneficiary certain rights against a trustee.

In the context of privity, if C is a beneficiary under a trust, C can bring an action against B, the trustee, that has the effect of compelling B to sue A for breach of contract. In formal procedural terms C sues in an action in which B and A are joined as defendants.

The use of trust law here does not give rise, in the strict sense, to an exception to the doctrine of privity. In conceptual terms, the action against A is pursued by B, albeit at C's insistence.

When the trust exception is pursued and B sues for damages, the measure of damages that is recovered reflect the loss to C, the beneficiary of the trust. The damages that are recovered are held by B on trust for C: Lloyd's v Harper; and Eslea Holdings Ltd v Butts

(c) Estoppels

Following the decision in Waltons Stores (Interstate) Ltd v Maher, a third party may be able to seek relief against a promisor on the basis of promissory estoppels principles. To succeed the third party would need to establish the elements of promissory estoppels.

In Trident, Mason CJ, Wilson J, at 123-124, were of the view that it was likely that estoppels could be established on the facts of the case, but it was not necessary for them to determine the issue on the basis that they had decided the case on other grounds.

(d) Unjust Enrichment

The essence of the principle is that it requires a defendant 'to make fair and just restitution derived at the expense of a plaintiff': Pavey & Matthews Pty Ltd v Paul.

In Trident, Deane J, at 145-146, indicated that the principle could possibly be the basis for a third party to seek relief. However, it was Gaudron J, especially at 176, in Trident who based her decision in favour of Mc Niece Bros on the basis of the principle of unjust enrichment.

The action based upon unjust enrichments is not based upon the contract but independent of it. However, usually it will correspond in content and duration with the promisor's.

4. **Statutory exceptions to the doctrine of privity of contract**

   As per the Indian contract Act 1872, the exception to the doctrine of privity of contract are given under section

   As per the Contracts (Rights of Third Parties) Act 1999 (UK)

1. – (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if-

   (a) the contract expressly provides that he may, or

   (b) subject to subsection

(2), the term purports to confer a benefit on him. (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

This entails that a person who is named in the contract as a person authorized to enforce the contract or a person receiving a benefit from the contract may enforce the contract unless it appears that the parties intended that he may not.

As per the Contracts (Rights of Third Parties) Act 1999 court can enforce a third party to a contract only when –

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

4. How can a third party can be avoided in a contract?

   A third party can be included in a contract only when he/she is an intended beneficiary named in the contract and must be intended to be benefited expressly in the contract. An incidental beneficiary has no rights to recover anything under the contract.

5. Case laws

- In Donoghue v. Stevenson a friend of Ms. Donoghue bought her a bottle of ginger beer, which was defective. Specifically, the ginger beer contained the partially decomposed remains of a snail. Since the contract was between her friend and the shop owner, there was no privity of contract between the manufacturer and the consumer, but it was established that the manufacturer has a duty of care owed to their consumers and she was awarded damages in tort.
- In Dunlop Pneumatic Tyre v. Selfridge and Co. Ltd. through the judgment of Lord Haldane the doctrine of privity of contract further developed.
- In Australia, it has been held that third-party beneficiaries may uphold a promise made for its benefit in a contract to which it is not a party (Trident General Insurance Co Ltd v. MacNeice Bros Pty Ltd (1988) 165 CLR 107). There were caveats however; the two parties to the contract are able to vary the terms of the contract as they see fit, unless the third-party has relied on the promise, and the promisor is subject to any defenses that it would have had, had the promise been enforced by the promisee.
- The issue any difficulties with consideration moving from the stevedores must be made out. was explored in New Zealand Shipping Co Ltd v. A M Satterthwaite & Co Ltd [1975] AC 154, where it was held that the stevedores had provided consideration for the benefit of the exclusion clause by the discharge of goods from the ship.
- New Zealand has enacted the Contracts Privity Act 1982, which enables third parties to sue if they sufficiently identified as beneficiaries by the contract, and in the contract it is expressed or implied they should be able to enforce this benefit.
- In Price v. Easton, where a contract was made for work to be done in exchange for payment to a third party. When the third party attempted to sue for the payment, he was held to be not to be in privity to the contract, and as such his claim failed.
- In the case of Winterbottom v. Wright[7], in which Winter bottom, a postal service wagon driver, was injured due to a faulty wheel, attempted to sue the manufacturer Wright for his

injuries. The courts however decided that there was no privity of contract between manufacturer and consumer in order to support the Industrial Revolution.

- MacPherson v. Buick Motor Co[8]., a case analogous to Winterbottom v Wright involving a car's defective wheel. Judge Cardozo, writing for the New York Court of Appeals, decided that no privity is required when the manufacturer knows the product is probably dangerous if defective, third parties i.e. consumers will be harmed because of said defect, and there was no further testing after initial sale.
- In Provender v. Wood[9] case one father in law told another father in law that if their kids got married he will give the groom money. They got married and there was no money given to the groom. Groom sued the father in law. In this case he won because the 3rd party was so closely related to the contract.

**Capacity of Parties**

For a valid contract, the parties to a contract must have capacity i.e. competence to enter into a contract. Every person is presumed to have capacity to contract but there are certain persons whose age, condition or status renders them incapable of binding themselves by a contract. Incapacity must be proved by the party claiming the benefit of it and until proved the ordinary presumptions remains.
Section 11 of the Contract Act deals with the competency of parties and provides that "every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from disqualified from contracting by any law to which he is subject."

**It follow that the following person are incompetent to contract:**

(a) minor
(b) person of unsound mind, and
(c) Person disqualified by any law to which they are subject.
Contract entered into by the persons mentioned above are void.

**Every person is competent to contract:**

(a) Who is of the age of majority.
(b) Who is of sound mind.
(c) Who is not disqualified from making a contract.

**Therefore the following persons are not competent to contract**

(a) A person who is a minor.

(b) A person of unsound mind.

(c) A person who is diqualified from making a contract.

**Minor: Who is Minor?**

An infant or a minor is a person who is not a major. According to the Indian Majority Act, 1875, a minor is one who has not completed his or her 18th year of age. A person attains

majority on completing his 18th year in India.
In the following two cases, a person continues to be a minor until he completes the age 21 years.

1. Where a guardian of a minor' person or property has appointed under the Guardians and Wards Act, 1890; or
2. Where the superintendence of a minor's property is assumed by a court of wards. An amendment to this ACt was made by Indian Majority (Amendment) Act 2000 which fixed uniform age of majority as 18 years irrespective of the fact whether any guardian has been appointed but president's assent to kid has yet to be obtained.

To deal with the problem the law provides the following two approaches:

1. In case of contracts relating to ordinary merchantile transactions, the age of majority is to be determined by the law of place where the contract is made.
2. In case of contracts relating to land, the age of majority is to be determined by the law of the place where the land is situated.

Example:

A, 18 years old-domiciled in india, endorsed certain negotiable Instrument in Ceylon, by the law of which he was a minor. Therefore, he was held not to be liable as endorser.

**Free Consent**

**Consent**

For a Contract to be valid, the consent of the parties must be genuine. The principle of *consensus-ad-idem* is followed which means that the parties entering into the contract must mean the same thing in the same sense. The parties to the contract must have the same understanding in regards to the subject matter of the contract.

Mere consent is not enough for a contract to be enforceable the consent given must be free and voluntary. The definition of Free consent is provided under the Indian Contracts Act is Consent that is free from Coercion, Undue Influence, Fraud, Misrepresentation or Mistake. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Clearly, Free Consent means the absence of any kind of coercion, undue influence, fraud, misrepresentation or mistake. When the consent which is given is affected by these elements it calls into question whether the consent given was free and voluntary. The objective of this principle is to ensure that judgment of the parties while entering into the contract wasn't clouded. Therefore consent given under coercion, undue influence, fraud, misrepresentation or mistake has the potential to invalidate the contract.

**Factors which invalidate consent**

As stated above, consent given by a party must be absent of:

*Coercion*

According to the Indian Contracts Act, 1872, coercion is defined as:

*"'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."*

A point to be remembered is that it is not necessary that the IPC is applicable at the place the consent was obtained. A very crucial part of the law is the phrase "to the prejudice of any person whatever" which means the coercion could be directed against the prejudice of any person and not just the party to the contract. It is also not necessary that only the party to the contract causes the coercion. Even a third party to the contract can cause coercion to obtain the consent, as was seen in the case of *Ranganayakamma v. Alwar Sethi*where a widow was coerced into adopting a boy by the boy's parents by not allowing the corpse of the widow's husband to be removed from the home until the adoption is made.

The burden of proof in cases of coercion lies on the party whose consent was coerced. When consent of a party was obtained through coercion, the contract becomes voidable at the option of the party whose consent was so obtained.

*Undue Influence*

When the parties to the contract are in relationships in such a way that one party can dominate the will of the other and uses the unfair advantage so gained to obtain the consent of the other party, then the consent is said to have been obtained by undue influence. Now, the Contract Act 1872 also provides instances where a person can dominate the will of another. These instances are:

- Where a person has a real or apparent authority over the other.
- Where a person has a fiduciary relationship with the other.
- Where a person enters into a contract with another whose mental capacity is affected, either temporarily or permanently.

When a party who in a position to dominate the will of the other, enter into a contract and the contract prima facie appears to unconscionable, then it is the burden of the party who in a position to dominate, to prove that consent has not been obtained by undue influence.

When the consent of the party to the contract has been obtained through undue influence, then the contract becomes voidable at the option of the party whose consent has been so obtained.

*Fraud*

Consent is not said to be free when it has been obtained by means of fraud. In such cases, the contract becomes voidable at the option of the party whose consent was obtained by means of fraud. Moreover, fraud is also a tort where action for damages can lie. The Indian Contract Act, 1872 gives the definition of the term 'Fraud'. The law provides five acts which when

committed either by the party or with his assistance or by his agent, with the intention to deceive the other party, amounts to fraud. Those acts are as follows:

- A suggestion, as to a fact which is false, by a party who believes it to be false.
- An active concealment of a fact by a party
- A promise made without any intention of fulfilling it.
- Any other act which can deceive.
- Any act or omission which the law specifically provides to be fraudulent.

Mere silence about facts which can affect the willingness of a person to enter into a contract does not amount to fraud, but if there is a duty to speak upon the person who is keeping silent, then it becomes a fraud. Example of such cases is Contracts Uberrima fides, also known as Contracts of Utmost good faith where full disclosure is expected.

The burden of proof in cases of fraud lies on the party who alleges it. The party has to prove the circumstances which can lead to the existence of fraud. Merely making a mention of fraud in the pleadings is not enough. If the party, whose consent has been obtained through fraud, had the opportunity or means to discover the truth with ordinary diligence, then the contract will not be void.

*Misrepresentation*

Misrepresentation under the Indian Contract Act, 1872 has an exhaustive definition and can be divided into 3 types.

- The first type is when a statement is made by a person, about a fact which is not true, though he believes it to be true.
- Second is the type when there is a breach of duty by a person who is making the false statement and he gains some kind of advantage even though it wasn't his intention to deceive the other party.
- The third is the type where if one party acting innocently, causes the other party to make any mistake with regards to the subject matter of the agreement.

As can be seen from above, the three types of misrepresentation have one very important thing in common, the intention of the party which misrepresents is innocent; it is not to deceive the other party into entering the contract. The intention of the party who makes the false statement is the difference between misrepresentation and fraud.

The burden lies on the party claiming misrepresentation to avoid the contract to prove that misrepresentation was used to obtain the consent. When consent was obtained through misrepresentation, it becomes voidable at the option of the party whose consent was so obtained.

*Mistake*

When one of the parties has given its consent to the contract under some kind of misunderstanding then the consent is said to be have been given by mistake. If it wasn't for the misunderstanding the party would not have entered into the agreement. Under contract law, a mistake can of two kinds: 1) Mistake of Law and 2) Mistake of Fact.

**Mistake of Law**

When the party has any misunderstanding with regards to the legal provisions, it is called Mistake of Law. Now, the party can be confused regarding the law of the Homeland or law of a foreign land. If it is a mistake regarding the law of the homeland, the contract cannot be avoided. The party cannot take the plea of having no knowledge of laws of his homeland. But if it is a mistake regarding the law of a foreign country, he can be excused.

**Mistake of Fact**

When the parties have any misunderstanding regarding the subject matter or terms of the contract, it is said to be a Mistake of fact. The misunderstanding can be on the part of one party or both of them.

*Bilateral Mistake* – When both the parties are under any misunderstanding/mistake relating to a matter of fact essential to the agreement, the agreement becomes void.

*Unilateral Mistake* – When the misunderstanding/mistake is on the part of one party to the contract, the agreement remains valid. Only when the party is mistaken about the parties to agreement or nature of the transaction, the agreement becomes void.

**Quasi Contract**

There are certain situations wherein certain persons are required to perform an obligation despite the fact that he hasn't broken any contract nor committed any tort. For instance, a person is obligated to restore the goods left at his home, by mistake, and keep it in good condition. Such obligations are called quasi-contracts.

Rationale

The rationale behind quasi-contract is based on the theory of Unjust Enrichment. Lord Mansfield is considered to be the founder of this theory. In Moses v. Macferlan[1] he explained the principle that law as well as justice should try to prevent unjust enrichment, i.e., enrichment at the cost of others.

A liability of this kind is hard to classify. Since it partly resembles liabilities under the law of tort and partly it resembles contract since it owed to only a party and not a person or individual generally. Therefore, it comes within the ambit of an implied contract or even natural justice and equity for the prevention of unjust enrichment.

However, in Sinclair v. Brougham, the theory of implied-in-fact was adopted.

Facts: a building society undertook banking business which was outside its object, and therefore, ultra vires . the society came to wound up. After paying up all outside creditors, a mixed sum of money was left which represented partly the shareholders money and partly that of the ultra vires depositors, but the money wasn't sufficient to pay all of them. The depositors tried to get priority by resorting to the quasi-contractual action for recovery of

money had and received for the depositors' benefit, else the shareholders would have been unjustly enriched.

The House of Lords allowed pari passu distribution of the mixed funds among the claimants, but did not allow any remedy under quasi-contract. It was maintained that the common law knows personal actions of only two classes, viz.,

a) Those founded on contract;

b) Those founded on tort.

when it speaks of action arising quasi ex contractu it refers only to a class of action in theory which is imputed to the defendant by a friction of law. This approach dominated the scene for quite some time and quasi contracts were taken to be fictional contracts.

Since this approach was restricting the scope of relief and was leading to unjust enrichment, the theory of unjust enrichment was again restored in Fibrosa Spolka Akeyjna v. Fairbain Lawson Combe Barbour Ltd. by Lord Wright. While referring the ratio decidendi of the decision in Sinclair v. Borogham, he stated that it was against public policy to allow the recovery of an ultra vires deposit, whether the claim is based on contract or quasi-contract. The observations in this particular case were merely the obiter dicta of the Sinclair Case.

In Indian context, the quasi-contracts are put under chapter V of the Indian Contract Act as OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACTS. The framers avoided the direct term quasi-contract in order to avoid the theoretical confusion regarding the same.

Sections 68 to 72 provide for five kinds of quasi-contractual obligations:

1. Supply of necessities [s.68]
2. Payment by interested persons [s.69]
3. Liability to pay for non-gratuitous acts [s.70]
4. Finder of goods [s.71]
5. Mistake of coercion [s.72]

**Supply of necessities [S.68]**

When necessities are supplied to a person who is incompetent of contract or to someone who is legally bound to support, the supplier is entitled to recover the price from the property of the incompetent person. incompetency to contract, here, would mean parties that are not competent to contract as per sec. 10 of the Act, i.e., in following circumstances:

- Minors
- Persons of unsound mind
- Persons disqualified by law to which they are subject

**Payments by interested persons [S.69]**

A person who is interested in the payment of money which another is bound by law to pay and who therefore pays it is entitled to be reimbursed by the other.

This section s subject to certain conditions:

- The plaintiff must be interested in making the payment. The interest which the plaintiff seeks to protect must be legally recognizable;
- It is necessary that the plaintiff himself should not be bound to pay. He should be interested in making the payment in order to protect his own interest;
- The defendant should have been bound by law to pay the money;
- The plaintiff should have made the payment to another person and not to himself.

**Liability for non-gratuitous act [S.70]**

S.70 creates liability to pay for the benefit of an act which the doer did not intend to do gratuitously. Where a person does something for another person not intending to do so gratuitously and such person is entitled to enjoy benefits from it. And then such a person who has used the thing has to compensate the other or restore or deliver the thing.

For example, A, a tradesman, leaves goods at B's house by mistake. B, treats the goods as his own. He is bound to pay A for them. Conditions of liability under this section are as follows:

- One of the purposes of the section is to assure payment to a person who has done something for another voluntarily and yet with the thought of being paid.
- The person for whom the act is being done is not bound to pay unless he had the choice to reject the services
- It is necessary that the services should have been rendered without any request
- Services should have been rendered lawfully
- The person rendering services should not have intended to act gratuitously

**Finder of goods [S.71]**

Section 71 lays down the responsibility of a finder of goods. The duties and liability of a finder is treated at par with the bailee. The finder's position, therefore, has been considered along with bailment.

**Mistake or coercion [S. 72]**

Section 72 states that payments or delivery made under mistake or coercion must be made good or be returned. In Sri Shiba Prasad Singh v. Maharaja Srish Chandra Nandi it was made clear that money paid under mistake is recoverable whether the mistake is of fact or of law. If a mistake either of law or of fact is established, the assessee is entiled to recover the money and the party receiving it is bound to return it irrespective of any other consideration. The scope of the word mistake has been clarified by the Supreme Court in Tilokchand Motichand v.Commissioner of Sales Tax.

Recovery proceedings generally are instituted by way of writ petition. There is no period of limitation in writs. The only requirement is that there should not be unreasonable delay

amounting to laches. In Chrisine Hoaden India Ltd. v. N.D. Godag, it was held that the period of limitation would not begin to run until the applicant has discovered the mistake or could have discovered it with reasonable diligence. The claim was laid within one month of the mistake of law becoming known. It was held that the claim could not be defeated on the ground of limitation. The term coercion is used in this section in its general sense and not as defined in Sec.15.

Nature of quasi-contractual obligations

The English Law identified quasi-contractual obligations first, the framers of the Indian Contract Act modified it and placed it in the Act as- certain relations resembling those created by contracts. Therefore the elements that are present in the English Quasi-contract are also found in that of the Indian Contract Act.

**1] Payments to the defendant's use.**

Two principles govern this liability they are:

- payment should have been made under pressure and not voluntarily;
- The defendant should have been bound to pay and has been relieved of his liability by the payment made by the plaintiff.

The kind of pressure that the law recognizes for the purposes of this remedy is clearly understood by the case of Exall v. Partridge[8], where, the plaintiff had left his carriage upon the premises which the defendant was leaving as a tenant. The landlord lawfully seized all the goods on the premises including the carriage for non-payment of rent and would have sold them in execution of his claim. The plaintiff paid the outstanding rent to get back his carriage and then sued the defendant for the amount. He was held entitled to it.

**2] Voluntary payments**

Payments made under the mistake of fact can be recovered provided that the party paying would have been liable to pay if the mistake of fact were true. In this respect one must look at the case of Kelly v. Solary, where the money was paid under a life insurance policy which to the knowledge of the company had lapsed. But, the fact of lapse having been forgotten at the moment, the company was held entitled to recover back the money. One of the essential conditions of this action is that the mistake must be of fact and must make the person liable to pay the money.

**3] Quantum Meriut**

There are situations wherein a party does the performance of a contract and further performance is made useless by the other party. In such cases the former can recover reasonable compensation from latter. An authority over the principle of quantum meruit is the case of Plinche v. Colburn,

FACT: the plaintiff was the author of several dramatic entertainments. He was engaged by the defendants, who were the publishers of a work called The Juvenile Library that used to

illustrate the history of armour and costumes from the earlier times. For this he was to be paid 100 guineas. The plaintiff made several drawings and completed a considerable part of the manuscript when the defendants discontinued his services. The plaintiff claimed an amount of 50 guineas for his work. Due to the principle of quantum meruit the plaintiff was held to be entitled to the claim.

**Legality of Object**

**Section 23 of the Indian Contract Act** has specified certain considerations and objects as unlawful. The consideration or objects of an agreement is lawful, unless- it is forbidden by law; is of such a nature that, if permitted, it would defeat the provision of any law; or is fraudulent; or involves injury to the person or property of another; or the court regards it as immoral or opposed to public policy.
In each of the above mentioned cases the consideration or object of an agreement is deemed to be unlawful. Every agreement in which the object or consideration is unlawful is void.

Some Examples

X promises to obtain for Y an employment in the public service, and Y promises to pay X Rs. 1000 for that. This agreement is void as the consideration in this case is unlawful.

X agrees to let her daughter to hire to Y as a concubine. This agreement is void as it is immoral and as a result opposed to law.

The following agreements are considered to be against public policy:

- Trade with the enemy:
- An agreement between the citizens of two countries at war with each other is void and hence inoperative.
- Agreement in interference with the course of justice:
- All agreements which interfere with the normal course of law and justice are deemed to be opposed to public policy and hence are void.
- Agreements which injure the public services are considered to be void.
- Agreements infringing personal freedom
- Agreements hindering parental duties.
- Agreements hindering marital duties

**Termination of Contract**

**Breach of Contract:**

Contract is made between the parties who are intended to bind together in a legal obligation i.e.to serve the interest of both the parties. The parties, in order to govern themselves and to safeguard their interest make their own terms and conditions. And when such terms and conditions are accepted by both the parties, there is an enactment of the contract i.e. the liability is imposed on the party to the contract and to function in accordance with the terms and conditions of the contract.

Though many a times, the contracting parties work according to the terms and conditions of the other party, there are instances when one party back steps, thus leading to the loss to other party.

This is referred as repudiation. According to the section 39 of the Indian contract Act, "Any intimation whether by words or by conduct that the party declines to continue with the contract is repudiation, if the result is likely to deprive the innocent party of substantial the benefit of the contract"

Thus, repudiation can occur when the either party refuses to perform his part, or makes it impossible for him to perform or even fails to perform his part of contract in each of the cases in such a manner as to show an intention not to fulfill his part of the contract.

Breach of contract is defined is a legal cause of action in which a binding agreement or bargained for exchange is not honored by one or more parties to the contract by non-performance or interference with the other party's performance. It the party does not fulfill his contractual promise, or has given information to the other party that he will not perform his duty as mentioned in the contract or if by his action and conduct he seems to be unable to perform the contract, he is said to be breach of contract.

Thus when a party having a duty to perform a contract fails to do that, or does an act whereby the performance of the contract by him becomes impossible, or he refuses to perform the contract, there is said to be a breach of contract on his part. On the breach of contract by the one party, the other party is discharged of his obligations to perform his part of the obligations.

Breach of a contract does not discharge the contract, thereby automatically termination the obligation of the innocent party. It gives an opinion to the innocent party to regard itself as discharged. The innocent party rescinds the contract, the primary obligation of both the parties is over, but the defaulting parties become liable for payment of compensation for the breach. The innocent party may also waive the defective performance and elect to accept damages instead of ending the contract.

The breach of contract may be either: (i) actual, i.e. non-performance of the contract on the due date of performance, or (ii) anticipatory, i.e. before the due date of the performance has come. Thus, when the party to the contract refuses to do an act or does an act at the time of the performance of the contract then it is said to be the actual breach of the contract, but when the party to the contract refuses to do an act or does an act before the time of performance by which the performance of the contract is not possible, the such breach is known as the anticipatory breach of contract.

Fundamental Breach of Contract

In today's globalized world, thousands of companies engage in business which involves millions of consumers. Thus, it would be difficult for these companies to draw up separate contract with every individual, they came out with Standard Form Of Contract, whereby a standard form with a large number of terms and conditions are there restricting the liability of the party to the contract. The individuals can hardly bargains with the massive organizations and therefore the only option available to them is either to accept it or reject it.

The doctrine of “Fundamental Breach” in the Law of Contract has developed mainly in the areas of sale (and hire-purchase), bailment and carriage.

RELEVANT FACTORS IN DETERMINING THE FUNDAMENTAL BREACH

According to the statement of the unofficial Secretariat Commentary on the 1978 Draft Convention,

12 scholars from different legal systems debated on standards for determining whether a breach is fundamental. A consensus was reached that the determination must be made in the light of the circumstances of each case. There is no such agreement, however there are some relevant factors, as generated by scholars and practitioner, in determining whether an injury is substantial enough to amount to fundamental breach which are roughly categorized under the following headings: a) nature of the contractual liability; b)gravity of the circumstances of breach; c) remedy-oriented approach; d) (in)ability of performance; e) (un)willingness to perform; f) lack of reliance on the other’s party’s future performance; g) offer to cure; and h)possible cure.

1. **Nature of the Contractual Obligation:** the nature of the contractual obligations is one factor in determination of fundamental breach. Where the parties have expressly or implicitly agree that in the case of a breach by one party, the other party may terminate the contract, strict compliance with the contract is essential and any deviation from the obligation is to be regarded as a fundamental breach. Absent such an express provision, the duty of the strict compliance may also be inferred from the language of the contract, the surrounding circumstances, custom usage or a course of dealing between the parties. The court often looks at the nature of the contractual obligation in considering whether strict performance is the essence of the contract. In the absence of the contract

- Quality of the Goods
- Timely delivery
- Disregard of the Seller’s

  Distribution System

2. **Gravity of the Consequences of the Breach:** Gravity of the consequences of the breach is another factor in determining fundamental breach. Whether or not the consequences of the breach actually deprive the party’s to the contract of the expectation under the contract as

- Contract’s overall Value and the Monetary Loss suffered by the Aggrieved Party
- Frustration of the purpose of the contract; and
- Remedy-oriented approach.

**3. (In) ability of the Performance:** One of the considerations in the determination of fundamental breach of contract is party’s (in ) ability to perform at all, that is to say either to deliver the ordered well or to pay the purchase price and to take delivery. Regardless of whether performance is due or non-performance is considered a fundamental breach where performance is objectively impossible, namely where the object of the transaction is unique and has been destroyed.

**4. (Un) Willingness of Performance:** This is another factor in determining whether fundamental breach is there or not. For e.g. one party refuses to deliver the goods or taking the goods, it therefore constitute the fundamental breach. Except in the cases, where the promisor is entitled to refuse the performance, the breach is not amounted to exist.

**5. Lack of Reliance on**

The other's Party Future Performance: – In determining fundamental breach, consideration is also given due importance. The party's contention is that whether the breach gives the aggrieved party reasons to believe that he may not rely on the other party's future performance. For example, that even where the contractual terms broken is minor and the consequences of the breach do not substantially deprive the aggrieved party of his expectation under the contract.

**6. Offer to Cure:** There is much controversy among the scholars as to whether fundamental breach should be determined in the light of the offers to cure. Many authors favor the consideration whether such offer in determining is fundamental breach or not. Their contention is that the breach is not fundamental as long as the repairs is possible within a reasonable time and without causing the aggrieved party unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

**Remedies for Breach of Contract**

**Where is a right, there is a remedy:**

A right would be no value if there were no remedy to enforce that right in the court of law, in the event of its infringement of breach of contract. A remedy is the means given by law for the enforcement of a right. When either of the parties breaches the contract, it gives the right to the other party to sue him for a remedy.

**Remedies For Breach of Contract:**

When a Contract is broken, the aggrieved party (the party who is not in breach) has one or more of the following remedies –

(1) Recession of the Contract
(2) Suit for Damages
(3) Suit upon Quantum Meruit
(4) Suit for Specific Performance
(5) Suit for Injunction

**(1) Recession**

Where there is a breach of contract the aggrieved party may sue treat the contract as rescinded and refuse further performance. In such case, he is absolved of all his obligations under the contract.

**(2) Suit for Damages**

The term "**damage**" is different from the term "**damages**. Damage means injury and damages means monetary compensation for the loss suffered by the aggrieved party in a breach of contract. The object of awarding damages for the breach of a contract is to put the injured party in the same financial position as if the contract had been performed. For example – in the position in which he would have been had there been performance and not breach.

**(3) Suit upon Quantum Meruit:**

The phrase **'**Quantum Meruit' means "as much as earned". A right to sue on a quantum meruit arise where a contract partly performed by one party, has become discharged by the breach of the contract by the other party. The right is founded on an implied promise by the other party arising from the acceptance of a benefit by that party.

**(4) Suit for Specific Performance:**

**"**Specific performance" means actual carrying out of the promise. In certain cases, the Court may direct the party in breach of contract for the actual carrying out of the promise, exactly according to the terms of the contract. This is called specific performance of the contract.

**(5) Suit for Injunction:**

An Injection is an order of the Court of Justice directing the defendant to do some positive act or restraining the commission or continuance of some Prohibitory Act (causing injury or loss to the plaintiff ).

**Law of Agency: Essentials, Kinds of Agents, Rights and Duties of Agents**

In India, the agent and principle share a relationship that is contractual in nature, and therefore it is governed by the terms and conditions of the contract between them. Chapter X of the Indian Contract Act, 1872 provides the basic structure of rules and regulations that basically govern the performance and formation of any type of contract including the agency contract. In agency contracts, there exists a legal relationship between two people whereby one person acts on behalf of the other.

Meaning

Section 182 of the Indian Contract Act defines an "agent" as a person employed to do any act for another or to represent another in dealing with a third person. The person for whom such act is done, or who is so represented, is called the "principal". Chapter 10 of the Indian Contract Act deals with the rights and liabilities and duties of principal and agent inter se as well as those of third parties. In an agency one person (principal) employs another person (agent) to represent him or to act on his behalf, in dealing with the third person. If an agent has been duly authorized to do an act on behalf of the principal, the principal is bound by such act with the third party as if the principal had done the act himself.

Different Kinds of Agents

Depending on the kind of authority given to the agent to act on behalf of the principal, the agents are of the various kinds.

1. **Auctioneers:** An auctioneer is an agent whose business is to sell goods or other property by public auction, i.e., by open sale. An auctioneer is a mercantile agent within the meaning of Section 2(9) the Sale of Goods Act. He only has the authority to sell goods and not to give warranties on behalf of the seller, unless expressly authorized in that behalf.
2. **Factors:** A factor is also a mercantile agent who is entrusted with the possession of the goods for the purpose of sale. He has the power to sell goods on credit and also to receive the price from the buyer. A factor has the right of general lien over the goods belonging to his principal, which are in his possession, for the general balance of the account.
3. **Brokers:** A broker is an agent who has an authority to negotiate the sale or purchase of goods on behalf of his principal, with a third person. Unlike factor, he himself has no possession of the goods. He gets his commission whenever any transaction materializes through his efforts.
4. **Del Credere Agents**: He is an exception to the rule that an agent is not answerable to his principal for the failure of the third party to perform the contract. A del credere agent is a mercantile agent, who, on payment of some extra commission, known as del credere commission, guarantees the performance of the contract by the third person. On the failure of the third person to pay, the principal can make the del credere agent liable.

**Some Features of a Contract of Agency**

1. Section 183 of the Indian Contract Act says that the principal should be competent to contract. Since through an agent, a contract is to be created between the principal and the third person, it is necessary that both of these parties should be competent to contract. Therefore, any person who is of the age of majority and of sound mind may employ an agent.
2. The agent may not be competent to contract. The capacity of the agent could be looked from two angles i.e capacity of the agent to act on behalf of the principal so as to bind the principal to the third person; and, the capacity of the agent to bind himself by a contract between himself and the principal. Considering the first case, Section 184 of the Indian Contract Act provides that, any person can become an agent even though he is not competent to contract. But, in the second case where it is about the capacity of the agent to bind himself by a contract between himself and the principal, it is necessary that the agent should be competent to contract. Thus, if an agent is minor, through him a valid contractual relationship will be created between the principal and the third person, though such an agent himself will not be responsible for his acts to his principal.
3. No consideration is necessary to create an agency. As per Section 185 of the Indian Contract Act, no consideration is necessary to create an agency. From the fact that the principal agrees to be bound by the act of the agent, and he has a duty to indemnify the agent, sufficient consideration is presumed, and, therefore, no other consideration is necessary for such a contract.

**Duties of an Agent**

1. **Duty not to delegate his duties.** Latin principle of ***"delegatus non potest delegare"*** states that an agent to whom some authority has been delegated cannot further delegate that authority to another person. The has been imbibed in Section 190 of the Indian Contract Act. It means an agent who agreed to act personally cannot appoint a sub-agent to do that job. But, there are certain exceptions to this rule where an agent can employ a sub-agent and these are, where there is a custom of trade to that effect, when the nature of agency so requires, when

action does not require a personal skill and when the principal expressly or impliedly agrees to the appointment of a sub-agent for doing certain work.

2. **Duty to follow the principal's directions**. an agent is bound to conduct the business of the principal according to the directions given by the principal. In absence of any directions, the agent should conduct the business according to the custom which prevails in doing the business of the same kind at the place where the agent conducts the business. When the agent does not act as stated above, if any loss is sustained by the principal, he must make it good to his principal, and if any profit accrues, he must account for it (Section 211).
3. **Duty to show proper skill and care** as in generally possessed by persons engaged in similar business unless the principal has notice of his want of skill. According to Section 212, he is bound to make compensation to his principal, in respect of the direct consequences of his own neglect, want of skill, or misconduct.
4. **Duty to render proper accounts to the principal on demand (Section 213).**
5. **Duty to communicate with the principal** and in case of difficulty use all his diligence in communicating with his principal, and in seeking to obtain his instructions (Section 214).
6. **Duty to not deal on his own account in the business of the agency,** unless the principal consents thereto. And, if the agent does so without the prior consent of the principal, the principal may, repudiate the transaction by showing either that any material fact has been dishonestly concealed from him or that the dealings of the agent have been disadvantageous to him (Section 215) or claim from the agent any benefit which may have resulted to him from the transaction (Section 216).
7. **Duty to pay sums received by him on the principal's account (Section 218)**. Before making the payment to his principal, the agent is entitled to deduct out of the same sums as are lawfully due to him (Section 217).

**Rights of Agent and Duties of Principal**

1. **Right to remuneration:** An agent is entitled to remuneration for the work of agency done by him, but an agent's remuneration does not become due until the completion of the act assigned to him. According to Section 219, this rule is subject to any special contract between the principal and the agent. However, as per the rule laid down in Section 220, an agent who is guilty of misconduct in the business of agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.
2. **Right to retain sumse** the agent has a duty to pay his principal all the sums received on the principal's account but has the right to retain money due to himself (Section 217).
3. **Right of lien on principal's property until commission**, etc. due to him has been paid (Section 221).
4. **Right to be indemnified.** It is very crucial, the principal is bound to indemnify an agent against the consequences of all lawful acts done by such agent in the exercise of the authority conferred upon him (Section 222). The agent is also entitled to indemnify against the consequences of the act done in good faith, even though the act causes an injury to the rights of third persons (Section 223). And, if an agent commits crime at the instance of the principal, the agent cannot claim indemnity from the principal against the consequences of the crime, even though the principal has expressly or impliedly, promised to indemnify him (Section 224).
5. **Right to compensation for damage due to the principal's neglect** in respect to an injury caused to such agent (Section 225).

Relations of Principal and Agent with Third Person

**Liability of the Principal**

According to Section 226 of the Indian Contract Act, an agent acts on behalf of the principal for creating contractual relationship between the principal and the third persons, and, therefore, for the contracts entered into through an agent, the principal becomes bound towards a third person in the same manner as if he entered into the contract himself. Apart from being bound by the acts which are done under the principal's authority or for which he is bound in an emergency, by estoppel or ratification, the question of the principal's liability arises in the following cases:

1. **Principal's liability when the agent exceeds authority –**Section 227 states that the principal is bound only for such acts of the agent which are within the authority of the agent. He is not liable for the agent's acts done outside the authority. If a part of the agent's act is within the authority and a part outside it, and both can be separated, the principal is bound by that part which is within the authority, and not for that part which is outside the authority. And Section 228 talks about how if the two parts cannot be separated, then the principal is not bound to recognize the transaction.
2. Notice to the agent is notice to the principal, but it should be in the course of business (Section 229).
3. **Principal's liability for the agent's fraud, misrepresentation or torts.**According to Section 238, when there is a fraud or misrepresentation by an agent while making an agreement on behalf of the principal, it not only affects the validity of the contract but also makes the principal liable, as if that fraud or misrepresentation has been made by the principal. The liability of the principal is based on the rule ***'Qui facit per alium facit per se***', which means the act of the agent is the act of the principal. For example, in **National Bank of Lahore v. Sohan Lal,** the manager of a bank, tampered with the locks of the lockers in which plaintiffs' valuables were kept, the bank was held vicariously liable for the loss which has been caused to a customer due to the theft of their valuables from the lockers.

**Personal Liability of the Agent**

According to the Section 230 of the Indian Contract Act, when an agent acts on behalf of his principal in his dealings with a third person, a contractual relationship between the principal and the third person is created and the agent is not personally liable. It is the principal who is liable to the third person. Nor is the agent entitled to enforce the contracts entered into on behalf of the principal and this is subject to contract to the contrary.

In the following exceptional cases, the agent is presumed to have agreed to be personally bound :

1. **When the agent acts on behalf of a foreign principal –**When an agent has entered into a contract for the sale or purchase of goods on behalf of a principal resident abroad, the presumption is that the agent undertakes to be personally liable for the performances of such contract.
2. **When the agent acts for an undisclosed principal**e. when he does not disclose the name of the principal then there arises a presumption that he himself undertakes to be personally liable. When the principal is undisclosed, the liability under Section 230 is of the agent only, and the principal cannot be sued in such a case. And under Section 231, if an agent makes a contract with a person who neither knows nor has the reason to suspect that he is an agent, his principal may require the performance of the contract. This Section also makes clear that the

rights of a third person, he has against the principal. If the principal wants to obtain the performance of the contract, he can do so subject to the rights and obligations between the agent and the third person (Section 232).

3. **When the principal cannot be sued**e. he is someone who is not potent to contract, the agent is presumed to be personally liable. (Section 230)
4. **When there is a contract for the agent's personal liability** – Section 230 mentions the general rule that the agent is not personally liable also states that this is so "in the absence of any contract to that effect". If an agent undertakes a personal liability, for example, he purchases the goods mentioning himself as the purchaser and does not disclose that he is an agent and mentions that the purchaser is under obligation to perform the contract, the agent will be personally liable in such a case (**Alliance Milla v. India Cements Ltd.)**
5. **When the agent commits a breach of legal obligation**e fails to perform a legal obligation, such as a contractual duty or statutory duty or commits a tort against a third person, that renders him personally liable for the consequences thereof.
6. **Liability of pretended agent –**if the agent pretends but is not an actual agent, without any authority and the principal does not rectify the act but disowns it, the pretended agent will be himself liable (Section 235).
7. **Liability for breach of warranty of authority –**When the agent exceeds his authority, misleads the third person in believing that the agent he has the requisite authority in doing the act, then the agent can be made liable personally for the breach of warranty of authority.

**Creation of Agency, Termination of Agency**

An "agent" is a person employed to do any act for another, or to represent another in dealing with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

The relationship between an agent and a principal is called an "Agency." An agent therefore brings together his principal and a third person. Ex- A appoints B to Purchase a house for him. A is the principal, B is an agent and the relationship between them is that of Agency.

**GENERAL RULES OF AGENCY**

1. Whatever a person competent to contract may do by himself, he may do through an agent, except for acts involving personal skill and qualifications. Like, a person cannot marry through an agent, a person cannot paint a picture through agent.
2. The acts of an agent are acts of a principal for all legal purposes.

***WHO MAY EMPLOY AN AGENT (Sec 183)-*** According to law, any person who is of the age of majority and who is sound mind, may employ an agent. Any person competent to contract may employ an agent, and a minor, a lunatic or a drunken person cannot employ an agent.

***Who can be an agent (Sec 184)-*** "as between principle and third person any person may become agent" . thus even a minor, a lunatic or a drunken person can be employed as an agent. However, in such case because runs a great risk as he cannot hold such an agent liable for misconduct or negligence.

**Creation of Agency** The following are different modes of creation of agency.

1. Agency by Express agreement.
2. Agency by Operation of law.
3. Agency by Ratification.
4. Agency by Implied authority.

**1. Agency by Express agreement:** Number of agency contract come into force under this method. It may be Oral or documentary or through power of attorney.

**2. Agency by operation of law:** At times contract of agency comes into operation by virtue of law.

For example: According to partnership act, every partner is agent of the firm as well as other parties. It is implied agency. On account of such implied agency only a partner can bind over firm as well as other partners, to his activities. In the same way according to companies act promoters are regarded as agents to the company

**3. Agency by Ratification:** Ratification means subsequent adoption of an activity. Soon after ratification principal – agent relations will come into operation. The person who has done the activity will become agent and the person who has given ratification will become principal.

- Ratification can be express or implied. In case where adoption of activity is made by means of expression, it is called express ratification. For example: Without A`s direction, B has purchased goods for the sake of A. There after A has given his support (adoption) to B`s activity, it is called Ratification. Now A is Principal and B is agent.
- The ratification where there is no expression is called implied ratification. For example: Mr. Q has P`s money with him. Without P`s direction Q has lent that money to R. There after R has paid interest directly to P. Without any debate P has taken that amount from R. It implies that P has given his support to Q`s activity. It is implied ratification.

**4. Agency by implied authority:** This type of agency comes into force by virtue of relationship between parties or by conduct of parties.

For example: A and B are brothers, A has got settled in foreign country without any request from A, B has handed over A`s agricultural land on these basis to a farmer and B is collecting and remitting the amount of rent to A. Here automatically A becomes principal and B becomes his agent. Agency by implied authority is of three types as shown below;

- Agency by Necessity
- Agency by Estoppel
- Agency by Holding out.

***(i) By Necessity***: At times it may become necessary to a person to act as agent to the other in emergency situation where the property or interest of another is in danger . the conditions which enables a person to act as an agent of another in necessity are as follows:

1. There should be a real necessity for acting on behalf of the principal.

2. It should be impossible to communicate with the principle within the time available.
3. The alleged agent should act bonafide in the interest of the principal.

For example: A has handed over 100 bags of butter for transportation, to a road transport company. Actually it is bailment contract assume that in the transit all vehicles has got stopped where it takes one week for further movement. So the transport company authorities have sold away the butter in those nearby villages. Here agency by necessity can be seen.

***(ii) By Estoppel****:* Where a person, by his conduct or words spoken or written, willfully leads another to believe that a certain person is acting as his agenct, he is estopped later on from denying the truth of the fact that such a person is dealing as his agent.

***Example:*** In presence of A , B says to C that he (B) is A`s agent though it is not so actually. A has not restricted B from making such statement. It is agency by estoppel.

***(iii) By Holding out****:* the principal is bound by the act of agent if on an earlier occasion he has made others believe that other person doing some act on his behalf is doing with his authority.

***Example:*** Y is X`s servant and X has made Y accustomed to bring goods on credit from Z. On one occasion X has given amount to Y to bring goods from Z on cash. B bought goods on credit as usually and runs away with the money. This is agency by holding out and therefore X is liable to pay amount to Z.

**Termination of Agency**

An agent's authority can be terminated at any time. If the trust between the agent and the principal has broken down, it is not reasonable to allow the principal to remain at risk in any transactions that the agent might conclude during a period of notice.

Agency can be terminated by following ways:

By Agreement

On the basis that agency relationship is created by agreement between the principal and the agent, such a relationship can also be brought to an end by mutual agreement between the parties, either in writing or orally[i] .

Termination by agreement may also occur if the agency relationship is terminated pursuant to the provisions of the agreement itself. The following situations may arise in this context:

If the agreement provides for the appointment of the agent for a specified period of time, the agency will come to an end automatically when that period of time expires.

If the agreement provides for the agency to terminate upon the occurrence of a specified event, the agency will come to an end upon the happening of the specified event.

By the Act of Parties

An agency may be terminated by the acts of the either principal or the agent as illustrated below:-

Performance by the agent

If an agent is appointed to accomplish a particular task or for a specific purpose, when the task is accomplished by the agent or the specific purpose is attained, the agency will terminate.

Revocation by the principal

The authority of an agent may be revoked at any time by the principal. However unilateral revocation otherwise than in accordance with the provisions of the agency agreement may render the principal liable to the agent for the breach of agency agreement.

Any word or conduct of the principal inconsistent with the continued exercise of the authority by the agent may operate as revocation of the agency.

Revocation's of the agent's power by the principal may not automatically discharge the principal from liability to a third party who is entitled to rely from liability to a third party who is entitled to rely from liability to a third party who is entitled to rely from liability to a third party who is entitled to rely on the apparent authority of the agent on ground's of representation by the principal of previous course of dealing with the agent's before notice of revocation is given to the third party .Therefore notice of revocation of an agent's power should be given to the third party as soon as possible.

Renunciation by agent

An agent is entitled to renounce his power by refusing to act or by notifying the principal that he will not act for the principal[ii].

Unilateral termination of the agency by the agent before he has fulfilled the obligations to the principal under the agency agreement will render the agent liable to the principal for the breach of the agency agreement such as payment of damages for the loss suffered by the principal.

By Notice

If the agency agreement provides that the agency may be terminated upon either party serving on the other written notice of a specified duration.

However, if the agency agreement does not contain any termination provision, the general rule is that reasonable notice has to be given to the other party to terminate the agency.

By Operation Of Law:

An agency may terminate by the operation of law upon the occurrence of particular events:-

Where the party concerned is an individual:

- By death
- By insanity
- By bankruptcy

Where the party concerned is a limited company

- Winding up
- Receivership

Frustration of the contract of agency.

# UNIT-2

**Negotiable instruments act 1881, Nature and Characteristics of Negotiable instruments**

**Section 13 of the Negotiable Instruments Act, 1881**, defines a negotiable instrument as: "A negotiable instrument means a promissory note, bill of exchange or Cheques payable either to order or to bearer." [Sec.13 (1)].

Negotiable means transferable. Instrument means document. Negotiable instrument, therefore, means a transferable document. Negotiable instrument entitles holder to the receipt of the money therein. It also gives him the right to transfer the same by delivery or by endorsement thereof. The Act deals with only three types of negotiable instrument, i.e., promissory notes, bills of exchange and Cheques.

The law relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881. The Act is based upon the English Common Law relating to promissory notes, bills of ex-change and Cheques. The Act came into force on 1st March 1882. The Act was enacted with an object to define and amend the law relating to promissory notes, bills of exchange and Cheques.

The Act extends to the whole of India. It does not affect any local usage relating to any instruments in an oriental language- for example, a hundi. Local usage applies to instruments in oriental language. However, such usages may be excluded by contract to the contrary, including that the legal relationship of the parties shall be governed by this Act (Sec.1). It must be noted that only when the local usage in the contrary to the provisions of this Act, then the local usage would override the Act.

**CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS:**

**Property:**

The possessor of the instrument is the holder and owner thereof. A negotiable instrument does not merely give possession of the instrument, but right to property. Whosoever gets possession of the instrument becomes its owner and is entitled to the sum mentioned therein as the holder. The complete right of ownership in a negotiable instrument passes by mere delivery where instrument is payable to 'bearer'. Where instrument is payable to 'order', right of ownership passes by endorsement and delivery.

**Defects in title:**

The holder in good faith and for value called the 'holder in due course' gets the instrument free from all defects of any previous holder.

Remedy:

The holder can sue upon the negotiable instrument in his own name. All prior parties are liable to him. A holder is due course can recover the full amount on the instrument.

Rights:

The holder in due course is not affected by certain de-fenses which might be available against previous holder, for example, fraud, to which he is not a party.

Payable to order:

A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable to a particular person. An instrument which does not restricts its transferability expressly or impliedly is negotiable whether the word 'order' is mentioned or not. The word 'Order' or 'Bearer' is no longer necessary to render an instrument negotiable. Where the instrument prohibits transfer or indicates that it shall not be transferrable is nevertheless valid as between the parties thereto, but it is not a negotiable instrument.

It must be noted that where a promissory note, bill of exchange or Cheques, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Payable to bearer:

A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank [Sec.13]. It specifies that the person in possession of the bill or note is a bearer of the instrument which is so expressed payable to bearer.

Payment:

A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one or two, or some of several payees [Sec.13 (2)].

Consideration:

Consideration in the case of a negotiable instrument is presumed.

Presumption:

Certain presumptions apply to all negotiable instruments.

**Kinds of Negotiable instruments: Promissory notes, Bills of exchange and Cheques**

**Negotiable Instruments** are written contracts whose benefit could be passed on from its original holder to a new holder. In other words, negotiable instruments are documents which promise payment to the assignee (the person whom it is assigned to/given to) or a specified person. These instruments are transferable signed documents which promise to pay the bearer/holder the sum of money when demanded or at any time in the future.

As mentioned above, these instruments are transferable. The final holder takes the funds and can use them as per his requirements. That means, once an instrument is transferred, holder of such instrument obtains a full legal title to such instrument.

Promissory notes

A promissory note refers to a written promise to its holder by an entity or an individual to pay a certain sum of money by a pre-decided date. In other words, Promissory notes show the amount which someone owes to you or you owe to someone together with the interest rate and also the date of payment.

For example, A purchases from B INR 10,000 worth of goods. In case A is not able to pay for the purchases in cash, or doesn't want to do so, he could give B a promissory note. It is A's promise to pay B either on a specified date or on demand. In another possibility, A might have a promissory note which is issued by C. He could endorse this note and give it to B and clear of his dues this way.

However, the seller isn't bound to accept the promissory note. The reputation of a buyer is of great importance to a seller in deciding whether to accept the promissory note or not

Bill of exchange

Bills of exchange refer to a legally binding, written document which instructs a party to pay a predetermined sum of money to the second(another) party. Some of the bills might state that money is due on a specified date in the future, or they might state that the payment is due on demand.

A bill of exchange is used in transactions pertaining to goods as well as services. It is signed by a party who owes money (called the payer) and given to a party entitled to receive money (called the payee or seller), and thus, this could be used for fulfilling the contract for payment. However, a seller could also endorse a bill of exchange and give it to someone else, thus passing such payment to some other party.

It is to be noted that when the bill of exchange is issued by the financial institutions, it's usually referred to as a bank draft. And if it is issued by an individual, it is usually referred to as a trade draft.

A bill of exchange primarily acts as a promissory note in the international trade; the exporter or seller, in the transaction addresses a bill of exchange to an importer or buyer. A third party, usually the banks, is a party to several bills of exchange acting as a guarantee for these payments. It helps in reducing any risk which is part and parcel of any transaction.

Cheques

A cheque refers to an instrument in writing which contains an unconditional order, addressed to a banker and is signed by a person who has deposited his money with the banker. This order, requires the banker to pay a certain sum of money on demand only to to the bearer of cheque (person holding the cheque) or to any other person who is specifically to be paid as per instructions given.

Cheques could be a good way of paying different kinds of bills. Although the usage of cheques is declining over the years due to online banking, individuals still use cheques for paying for loans, college fees, car EMIs, etc. Cheques are also a good way of keeping track of all the transactions on paper. On the other side, cheques are comparatively a slow method of payment and might take some time to be processed.

The Negotiable Instruments (Amendment) Bill, 2017

The Negotiable Instruments (Amendment) Bill, 2017 has been introduced in the Lok Sabha earlier this year on Jan 2nd, 2018. The bill seeks for amending the existing Act. The bill defines the promissory note, bill of exchange, and cheques. The bill also specifies the penalties for dishonor of cheques and various other violations related to negotiable instruments.

As per a recent circular, up to INR 10,000 along with interest at the rate of 6%-9% would have to be paid by an individual for cheques being dishonored.

The Bill also inserts a provision for allowing the court to order for an interim compensation to people whose cheques have bounced due to a dishonouring party (individuals/entities at fault). Such interim compensation won't exceed 20 percent of the total cheque value.

**Parties to Negotiable Instruments, Negotiation**

The parties to a negotiable instrument (bill of exchange, promissory note and a Cheques) are discussed in detail :

**Parties to a bill of exchange**

1. **The Drawer:** The person who draws a bill of exchange is called the drawer.
2. **The Drawee:** The party on whom such bill of exchange is drawn and who is directed to pay is called the drawee.
3. **The Acceptor:** The person who accepts the bill is known as the acceptor. Normally the drawee is the acceptor. But a stranger can also accept a bill on behalf of the drawee.
4. **The Payee:** The person to whom the amount of the bill is payable is called the payee.
5. **The Endorser:** When the holder transfers or endorses the instrument to any other person the holder becomes the Endorser.
6. **The Endorsee:** The person to whom the bill is endorsed is called the endorsee.
7. **The Holder:** Holder of bill of exchange means any person who is legally entitled to the possession of it and to receive or recover the amount due thereon form the parties. He is either the payee or the endorsee. The finder of a lost bill payable to bearer or a person in wrongful possession of such instrument is not a holder.
8. **Drawee in case of need:** The drawer of a bill or even an endorser may write in the instrument the name of a person directing the holder to resort to such person in case of need. Such a person is called a drawee in case of need. He is merely in the position of a drawee who has not accepted the bill. The bill cannot be presented to him for acceptance but only for payment.

   Where a drawee in case of need is mentioned in the bill such a bill is not dishonored until it has been dishonored by such a drawee in case of need. The effect of this provision is to make the presentment to the drawee in case of need obligatory on the part of the holder.

9. **Acceptor for Honour:** Any person may voluntarily become a party to a bill as an acceptor by accepting it for the honour of the drawer or of any person. When the original drawee refuses to accept or refuses to furnish better security when demanded by a notary, any person may step in to safeguard the honor of the drawer or any endorser and bind himself by an

acceptance. The effect of such acceptance is that the bill is treated as alive and is not considered to be dishonored till it is dishonored by the acceptor for honor.

**Parties to a promissory note**

1. The Maker: He is the person who promises to pay the amount stated in the promissory note.
2. The Payee: The person named in the promissory note to whom the money is payable.
3. The Holder: He may be either the payee or someone else to whom the promissory note has been endorsed.
4. The Endorser: When the holder transfers or endorses the instrument to any other person the holder becomes the Endorser.
5. The Endorse: The person to whom the bill is endorsed is called the endorsee.

**Parties to a cheque**

1. The Drawee: He is the person who draws the cheque.
2. The Drawee: The banker on whom the cheque is drawn.
3. The Payee: The person to whom the amount of the bill is payable is called the payee.
4. The Holder: Holder of bill of exchange means any person who is legally entitled to the possession of it and to receive or recover the amount due thereon form the parties. He is either the payee or the endorsee. The finder of a lost bill payable to bearer or a person in wrongful possession of such instrument is not a holder.
5. The Endorser: When the holder transfers or endorses the instrument to any other person the holder becomes the Endorser.
6. The Endorsee: The person to whom the bill is endorsed is called the endorsee.

**Negotiation**

When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute the person the holder thereof, the instrument is said to be negotiated.

**Section 46 of Negotiable Instruments Act 1881: "Delivery"**

The making, acceptance or indorsement of a promissory note, bill of exchange or cheque is completed by delivery, actual or constructive.

As between parties standing in immediate relation, delivery to be effectual must be made by the party making, accepting or indorsing the instrument, or by a person authorized by him in that behalf.

As between such parties and any holder of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.

A promissory note, bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof.

**Section 47 of Negotiable Instruments Act 1881: "Negotiation by delivery"**

Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof.

Exception : A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens.

Illustrations

(a) A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep for B. The instrument has been negotiated.

(b) A, the holder of a negotiable instrument payable to bearer, which is in the hands of A's banker, who is at the time the banker of B, directs the banker to transfer the instrument to B's credit in the banker's account with B. The banker does so, and accordingly now possesses the instrument as B's agent. The instrument has been negotiated, and B has become the holder of it.

**Section 48 of Negotiable Instruments Act 1881: "Negotiation by indorsement"**

Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof.

Presentment, Discharge and dishonour of Negotiable instruments

**Presentment**

Sec. 70. Effect of want of demand on principal debtor. – Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

**MEANING OF PRESENTMENT FOR PAYMENT**

- Production of a bill of exchange to the drawee for his acceptance, or to the drawee or acceptor for payment or the production of the promissory note to the person liable for payment of the same

1. Personal demand for payment at the proper place.
2. With the bill or note in readiness to exhibit it as required and to receive payment and surrender it if the debtor is willing to pay.

PRESENTMENT FOR PAYMENT NOT NECESSARY TO CHARGE PERSONS PRIMARILY LIABLE

- It cannot be validly claimed that it is presentment of the bill which is the operative act that makes the acceptor liable under his acceptance

PAYABLE AT A SPECIAL PLACE

- If the bill is payable at the PNB, is it necessary to make presentment for payment to X in order to charge him? No, the rule is the same. The only effect is that if, X is able and willing to pay the bill at the PNB at maturity, it is equivalent to a tender of payment on the part of drawee X.

PRESENTMENT NECESSARY TO CHARGE PERSONS SECONDARILY LIABLE

NECESSARY STEPS TO CHARGE PERSONS SECONDARILY LIABLE IN BILLS OF EXCHANGE

1. In the three steps required by law, presentment for acceptance to the drawee or negotiation within reasonable time after acquisition unless excused
2. If the bill is dishonored by non-acceptance, notice of dishonor by non-acceptance must be given to persons secondarily liable unless excused and in case of foreign bills, protest for dishonor by non-acceptance must be made unless excused.
3. But if the bill is accepted, or if the bill isn't required to be presented for acceptance, it must be presented for payment to the persons primarily liable unless excused.
4. If the bill is dishonored by non-payment, notice of dishonor by non-payment must be also be given to person secondarily liable unless excused, and in case of foreign bills, protest for dishonor by non-pay7ment must be made unless excused

NECESSARY STEPS TO CHARGE PERSONS SECONDARILY LIABLE

- Presentment for payment must be made within the period required to the person primarily liable unless excused.
- If the note is dishonored by non-payment, notice of dishonor by non-payment must be given to the person secondarily liable unless excused.

**Discharge of Negotiable instruments**

Discharge of a Negotiable Instruments

When the liability of the party, primarily and ultimately liable on the instrument, comes to an end, the instrument is said to be discharged. The discharge of the instrument results in extinguishment of all rights of action under it and the instrument ceases to be negotiable. After discharge of a negotiable instrument, even a holder-in-due-course acquires no right under it and he cannot bring a suit on the face of it.

Ways in which Negotiable Instruments are discharged?

A negotiable instrument may be discharged in any one of the following ways.

- By payment in due course
- By the principal debtor becoming the holder
- By renunciation of the rights by the holder
- By cancellation of the instrument
- By an act that would discharge an ordinary contract

1. By payment in due course

Payment-in-due-course, is the payment made in good faith and in accordance with the apparent tenor of the instrument to the rightful holder thereof. Accordingly, it is the payment made in money only on maturity of the instrument and of the entire amount due on it and the person to whom it is made should be in possession of the instrument. It may be noted that a payment of a post-dated cheque before maturity is not according to the apparent tenor of the instrument and hence, does not discharge the instrument unless the instrument is cancelled or the fact of payment is duly recorded on the instrument to prevent its further negotiation.

The person making the payment is entitled to have the instrument delivered back to him upon payment or if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him. Moreover, in order to discharge a negotiable instrument by payment-in-due-course, the payment should be made by the party who is primarily liable on the instrument. So if a party, who is not primarily liable, makes payment, the instrument is not discharged. The payment-in-due-course discharges not only the negotiable instrument in question but also the parties who are primarily and ultimately liable on the instrument as well.

2. By the principal debtor becoming the holder

When the acceptor of a bill of exchange becomes its holder on or after maturity thereof, all rights of actions thereon are extinguished. As a result, the instrument is discharged. An acceptor may become the holder of a bill by the process of negotiation back. But in order to discharge the bill it is essential that this happens after maturity because if he becomes holder of the bill before maturity, he may again endorse the same. Thus, a negotiable instrument is discharged if the acceptor has become the holder of the instrument at or after maturity in his own rights, i.e., not in any other capacity such as agent, executor, trustee, etc. For instance, A accepts a bill drawn on him by B. B later on transfers the instrument to C, and C endorses it to D, who endorses it to A. The instrument-in-question stands discharged by acceptor (A) becoming holder of it. This rule is based on the principle that a present right and liability united in the same person cancel each other.

3. By renunciation of the rights by the holder

If the holder of a negotiable instrument expressly gives up or renounces his rights against all the parties, the instrument is discharged. The renunciation can be made by surrendering or delivering the instrument to the party who is primarily liable thereon or declaring in writing the fact of renunciation. Such renunciation discharges the instrument as well as all the parties thereto.

4. By cancellation of the instrument

If the holder intentionally cancels the name of the drawer or acceptor of a promissory note or bill of exchange, the instrument is automatically discharged. It is important to note that the

cancellation should be made with an intention to release the party primarily liable on it, which in turn would discharge the other parties thereto. Cancellation of the instrument can be executed either by physical destruction or by crossing out signatures of drawer, acceptor, etc., on the instrument.

5. By an act that would discharge an ordinary contract

A negotiable instrument may also be discharged by an act that would discharge a simple contract for payment of money. This is technically called discharge of negotiable instrument by operation of law. Such a discharge may occur due to expiry of period prescribed for recovery of sum of money due on the instrument, or by substitution of another negotiable instrument for the original instrument or by an agreement between the parties in the form of novation. It may also take place by way of merger of one or more debt into another or by the debtor being adjudicated insolvent.

**Dishonour of Negotiable instruments**

**Dishonour of negotiable instrument** means loss of honour or respect for the instrument in question on the part of the maker, drawee, or acceptor, as the case may be, which eventually results in non-realization of payment due on the instrument.

Dishonour by non-acceptance:

Any type of negotiable instruments, i.e., **bill of exchange**, promissory note, or cheque may be dishonoured by non-payment by the drawee/acceptor thereof. But a bill may also be dishonoured by non-acceptance because bill of exchange is the only negotiable instrument which requires its presentment for acceptance and non-acceptance thereof, can amount to dishonour.

When is a bill said to be dishonoured by Non-Acceptance?

A bill is said to be dishonoured by non-acceptance in the following circumstances.

1. When the drawee or one of the several drawees, not being partners, commit default in acceptance upon being duly required to accept the bill. In this regard Section 63 expressly provides that the holdermust, if so required by the drawee of a **bill of exchange** presented to for acceptance, allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it.
2. Where presentment is required and the bill remains unrepresented.
3. Where the drawee is incompetent to enter into a valid contract.
4. Where the bill is given a qualified acceptance.
5. If the drawee is a fictitious person.
6. If the drawee cannot be found even after reasonable search.
7. Where the drawee has either become insolvent or is dead and the holder does not present the bill to the assignee or legal representative of the insolvent or deceased drawee.

It is relevant to note that where a drawee-in-case-of-need is named in a bill of exchange or in any endorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

Dishonour of negotiable instrument by Non-payment:

A promissory note, **bill of exchange**, or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill, or **drawee of the cheque** commit default in payment upon being duly required to pay the same. Also the holder of a bill or pro-note may treat it as dishonoured, without placing for payment when presentment for payment is excused expressly by the maker of the pro-note, or acceptor of the bill and the note or bill when overdue remains unpaid.

Dishonour by non-acceptance vs Dishonour by non-payment:

If a bill is dishonoured either by non-acceptance or by non-payment, the drawer and all the endorsers of the bill are liable to the holder, provided notice of such dishonour is given to them. The drawee, on the other hand, shall be liable to the holder only in the event of dishonour by non-payment.

Dishonour of Cheque for insufficient of funds in the account:

A cheque drawn by a person on an account maintained by him with a bank for payment of any amount of money to another person can be returned unpaid for lack of enough funds in the said account. This is called **dishonour of cheques** for insufficiency of funds (in the drawer's account). In such cases, the drawer is also criminally liable for this offense and may be punished with imprisonment for a term, which may extend to one year, or with fine that may extend to twice the amount of the cheque, or with both.

Dishonour of cheque vs promissory note:

A cheque being drawn on specified bank and not expressed to be payable otherwise than on demand is never presented to the drawee bank for acceptance and same is the case of a promissory note. However, a pro-note made payable at a certain period after sight is required to be presented for sight, but it is never subject to presentment for acceptance.

How is a party to a negotiable instrument discharged?

A party to a negotiable instrument is discharged in the following ways

- By cancellation of the name of a party to the instruments
- By release of any party to the instruments
- By payments
- By allowing drawee more than 48 hours to accept
- By delay in presenting a cheque for payment
- By payment in due course of a cheque (payable to order)
- By taking qualified acceptance
- By non-presentment for acceptance of a bill of exchange
- By operation of law
- By material alteration

**Law of partnership: Definition, essentials of partnership**

Partnership is a form of business organization, where two or more persons join together for jointly carrying on some business. It is an improvement over the '**Sole –trade business** ', where one single individual with his own resources, skill and effort carries on his own business. Due to the limitation of resources of only a single person being involved in the sole-trade business, a larger business requiring more investments and resources than available to a sole-trader, cannot be thought of in such a form of business organization. In partnership, on the other hand, a number of persons could pool their resources and efforts and could start a much larger business, than could be afforded by any of these partners individually. In case of loss the burden gets divided amongst various partners in a Partnership.

Criteria of Partnership:

Any two or more than two persons can join together for creating Partnership. Section 11 of the Companies Act, 1956 imposes limit as to maximum number of persons in a partnership for the purpose of carrying:

- Banking Business – There can be maximum of 10 persons.
- Any other purpose – There can be maximum of 20 persons.

If the number of members in any association exceeds the above stated limit, that must be registered as a company under Companies Act ,1956 otherwise that will be considered to be an illegal association.

As against partnership, where the maximum number of partners can be 10 or 20, depending on the nature of partnership business, there could be possibly much larger number of members in a company.

- In Private Company – Here there can be maximum of 50 members.
- In Public Company – Here there is no such limit to the maximum number.

Advantage of Partnership over A Company:

1. For the creation of partnership just an agreement between various persons is all what you require. In case of a company a lot of procedural formalities which have to be gone through before a company is created.
2. The partners are their own masters for regulating their affair. A company is subject to a lot of statutory control.
3. For dissolution of partnership, a mere agreement between the partners is enough But that is not the case of a company which can be wound up by only after certain set of procedure is followed.
4. Since all the profits are to be pocketed by the partners in a partnership firm, there is a great incentive for the partners to make business successful But that is not in case of a company.
5. In a Partnership the persons who have entered into are individually called partners and collectively a firm. A partnership firm does not have a separate legal personality. A company is a legal entity different from its members.

6. A partnership firm means all the partners put together, if all the partners cease to be partners, e.g., all of them die or become insolvent, the partnership firm gets dissolved. A company being a person different from the members, the members may come and go but the company's life is not affected thereby.
7. The shareholder of a company can transfer his share to anybody he likes but a partner cannot substitute another person in his place unless all the other partners agree to the same. Similarly, on the death of a member of a company his legal representatives will step into his shoes for the purpose of the rights in the company, but on the death of a partner his legal representatives do not get substituted in his place of partnership.
8. The minimum number of members in partnership in two and maximum in case of partnership carrying on banking business is 10 and in case of any other business is 20.In the case of a private company the minimum number is 2 and the maximum is 50 whereas in the case of a public company the minimum number should be 7 but there is no limit to the maximum number and therefore, any number of persons can hold shares in a public company.
9. The liability of the members of a company is limited but the liability of the partners is unlimited.

**Essential elements of partnership in business are given below:**

This definition contains five elements which constitute a partnership, namely:

(1) There must be a contract;

(2) Between two or more persons;

(3) Who agree to carry on a business?

(4) With the object of sharing profits; and

(5) The business must be carried on by all or any of them acting for all (i.e., there must be mutual agency).

All the above elements must coexist in order to constitute a **partnership**. If any of these is not present, there cannot be a partnership. We now discus these elements one by one:

1. **Contract:**

Partnership is the result of a contract. It does not arise from status, operation of law or inheritance. Thus at the death of father, who was a partner in a firm, the son can claim share in the partnership property but cannot become a partner unless he enters into a contract for the same with other persons concerned.

Similarly, the members of Joint Hindu Family carrying on a family business cannot be called partners for their relation arises not from any contract but from status. To emphasise the element of contract, Sec. 5 expressly provides mat "the relation of partnership arises from contract and not from status."

Thus a 'contract' is the very foundation of partnership. It may, however, be either express or implied. Again, it may be oral or in writing (Laxmibai vs. Roshan Lai).

2. **Association of two or more persons:**

Since partnership is the result of a contract, at least two persons are necessary to constitute a partnership. The Partnership Act does not mention any thing about the maximum number of persons who can be partners in a partnership firm but Sec. 11 of the Companies Act, 1956, lays down that a partnership consisting of more than 10 persons for banking business and 20 persons for any other business would be illegal. Hence these should be regarded as the maximum limits to the number of partners in a partnership firm.

Only persons competent to contract can enter into a contract of partnership. Persons may be natural or artificial. A company may, being an artificial legal person, enter into a contract of partnership, if authorised by its Memorandum of Association to do so.

Even there could be a partnership between a numbers of companies (Steel Bros. & Co Ltd. Vs. Commissioner of Income-tax). A partnership firm, since it is not recognised as a legal person having a separate entity from that of partners cannot enter into contract of partnership with another firm or individuals (Duli Chand vs. Commissioner of Income-tax).

When a firm (under a firm name) enters into a contract of partnership with another firm or individual, in that case, in the eye of law the members of the firms or firm become partners in their individual capacity (Commissioner of Income-tax vs Jadavji Narsidas & Co.).

3. **Carrying on of business:**

The third essential element of a partnership is that the parties must have agreed to carry on a business. The term 'business' is used in its widest sense and includes every trade, occupation or profession [Sec. 2(b)].

If the purpose is to carry on some charitable work, it will not be a partnership. Similarly, if a number of persons agree to share the income of a certain property or to divide the goods purchased in bulk amongst them, there is no partnership and such persons cannot be called partners because in neither case they are carrying on a business.

Thus, where A and B jointly purchased a tea shop and incurred additional expenses for purchasing pottery and utensils for the job, contributing necessary money half and half and then leased out the shop on rent which was shared equally by them, it was held that they are only co-owners and not partners as they never carried on any business (Govind Nair vs Maga).

Further, in order to be a partnership, the business must be 'carried on' which suggests continuity or repetition of acts. Merely a single isolated transaction of purchase and sale by a number of persons does not mean carrying on of the business.

But if a number of articles are purchased at one time and the sales are to go on, profits are to be realised and are to be divided amongst a number of persons, there is a carrying on of business.

Section 8, however, provides that there can be 'particular partnership' between partners whereby they engage in a particular adventure or undertaking, which if successful, would result in profit.

Thus, there can be a partnership business as to the working out of a coal mine, or the sowing, cropping, harvesting and sale of a particular crop, or the production of a film because although in each of these cases there is a single adventure but the same requires a series of transactions and continuing relationship (Ram Dass vs Mukut Dharfi).

4. **Sharing of profits:**

This essential element provides that the agreement to carry on business must be with the object of sharing profits amongst all the partners. Impliedly the partnership must aim to make profits because then only profits may be divided amongst the partners.

Thus, there would be no partnership where the business is carried on with a philanthropic motive and not for making a profit or where only one of the partners is entitled to the whole of the profits of the business. The partners may, however, agree to share profits in any ratio they like.

**Sharing of losses not necessary:**

To constitute a partnership it is not essential that the partners should agree to share the losses (Raghunandan vs. Harmasjee[1]). It is open to one or more partners to agree to bear all the losses of the business.

The Act, therefore, does not seek to make agreement to share losses a test of the existence of partnership. Section 13(6), however, provides that the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm, unless otherwise agreed.

Thus sharing of losses may be regarded as consequential upon the sharing of profits and where nothing is said as to the sharing of losses, an agreement to share profits implies an agreement to share losses as well.

It must be noted that even though a partner may not share in the losses of the business, yet his liability vis-a-vis outsiders shall be unlimited because there cannot be 'limited partnerships' in our country under the Partnership Act.

**Sharing of profits not conclusive test:**

Although sharing of profits is an evidence of partnership but this is not the conclusive test of partnership. There may be persons sharing the profits of a business but who do not by that reason become partners.

In this respect Explanation II to Section 6 clearly states: "The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business; and, in particular, the receipt of such share or payment:

(a) By a lender of money to persons engaged or about to engage in any business,

(b) By a servant or agent as remuneration,

(c) By a widow or child of a deceased partner as annuity, or

(d) By a previous owner or part-owner of the business as consideration for the sale of the goodwill or share thereof, does not itself make the receiver a partner, with the persons carrying on the business."

The question whether a person sharing profits of a business is a partner or not depends upon the real relation between the parties, as shown by all relevant facts taken together (Sec. 6).

5. **Mutual agency:**

The fifth element in the definition of a partnership provides that the business must be carried on by all the partners or any (one or more) of them acting for all, that is, there must be mutual agency.

Thus every partner is both an agent and principal for himself and other partners, i.e. he can bind by his acts the other partners and can be bound by the acts of other partners in the ordinary course of business.

To test whether a person is a partner or not, it should be seen, among other things, whether or not the element of agency exists, i'. e., whether the business is conducted on his behalf.

It is on the basis of this test that a widow of a deceased partner or a manager having a share in the profits is not a partner, because business is not carried on her or his behalf. If she or he does something the firm is not legally bound by that.

The importance of the element of mutual agency lies in the fact that it enables every partner to carry on the business on behalf of others. Partners may agree among themselves that some one of them shall not enter into any contracts on behalf of the firm, but by virtue of the principle of mutual agency, such partner can bind the firm vis-a-vis third parties without notice in contracts made according to the ordinary usage of trade.

Of course he can be made liable by other partner's inter-se for exceeding his authority. In fact, the law of partnership governing relations of the partner's inter-se and with the outside world is an extension of the law of agency.

In Cox vs. Hickman it was rightly observed: "The law as to partnership is undoubtedly a branch of the law of the principal and agent…. The liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent.

Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to usual course of business in that trade.

Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners; all are therefore liable for the ordinary trade contract of the other. The public have a right to assume that every partner has authority from his co-partners to bind the whole firm in contracts made according to the ordinary usage of trade."

**Formation of Partnerships, Kinds of Partners, Authorities, Rights and Liabilities of Partners**

**Formation of Partnerships**

A partnership is a business arrangement in which two or more people own an entity, and personally share in its profits, losses, and risks. The exact form of partnership used can give some protection to the partners. A partnership can be formed by a verbal agreement, with no documentation of the arrangement at all. However, there may be subsequent disagreements among the owners at a later date, so it makes sense to create a written document that states how certain situations are to be handled. This partnership agreement should at least cover the following topics:

- The rights and responsibilities of each partner
- Whether partners are designated as general partners or limited partners
- The proportions of partnership gains and losses to be apportioned to each partner
- Procedures related to the withdrawal of funds from the partnership, as well as any limitations on these withdrawals
- How key decisions are to be resolved
- Provisions regarding how to add and terminate partners
- What happens to partnership interests if a partner dies
- What steps to follow to dissolve the partnership
- The proportions of residual cash paid out to the partners in a liquidation

In addition to the partnership agreement, the partners must engage in a number of other formation activities that are common to all types of businesses. These actions include:

- Register the business name
- Obtain an employer identification number
- Obtain any licenses required by governments where the partnership plans to operate
- Open a bank account in the name of the partnership
- File an annual informational return with the Internal Revenue Service

**Kinds of Partners**

1. Active or managing partner:

A person who takes active interest in the conduct and management of the business of the firm is known as active or managing partner.

He carries on business on behalf of the other partners. If he wants to retire, he has to give a public notice of his retirement; otherwise he will continue to be liable for the acts of the firm.

2. Sleeping or dormant partner:

A sleeping partner is a partner who 'sleeps', that is, he does not take active part in the management of the business. Such a partner only contributes to the share capital of the firm, is bound by the activities of other partners, and shares the profits and losses of the business. A sleeping partner, unlike an active partner, is not required to give a public notice of his retirement. As such, he will not be liable to third parties for the acts done after his retirement.

3. Nominal or ostensible partner:

A nominal partner is one who does not have any real interest in the business but lends his name to the firm, without any capital contributions, and doesn't share the profits of the business. He also does not usually have a voice in the management of the business of the firm, but he is liable to outsiders as an actual partner.

*Sleeping vs. Nominal Partners:*
It may be clarified that a nominal partner is not the same as a sleeping partner. A sleeping partner contributes capital shares profits and losses, but is not known to the outsiders.

A nominal partner, on the contrary, is admitted with the purpose of taking advantage of his name or reputation. As such, he is known to the outsiders, although he does not share the profits of the firm nor does he take part in its management. Nonetheless, both are liable to third parties for the acts of the firm.

4. Partner by estoppel or holding out:

If a person, by his words or conduct, holds out to another that he is a partner, he will be stopped from denying that he is not a partner. The person who thus becomes liable to third parties to pay the debts of the firm is known as a holding out partner.

There are two essential conditions for the principle of holding out : (a) the person to be held out must have made the representation, by words written or spoken or by conduct, that he was a partner ; and (6) the other party must prove that he had knowledge of the representation and acted on it, for instance, gave the credit.

5. Partner in profits only:

When a partner agrees with the others that he would only share the profits of the firm and would not be liable for its losses, he is in own as partner in profits only.

6. Minor as a partner:

A partnership is created by an agreement. And if a partner is incapable of entering into a contract, he cannot become a partner. Thus, at the time of creation of a firm a minor (i.e., a person who has not attained the age of 18 years) cannot be one of the parties to the contract. But under section 30 of the Indian Partnership Act, 1932, a minor 'can be admitted to the

benefits of partnership', with the consent of all partners. A minor partner is entitled to his share of profits and to have access to the accounts of the firm for purposes of inspection and copy.

He, however, cannot file a suit against the partners of the firm for his share of profit and property as long as he remains with the firm. His liability in the firm will be limited to the extent of his share in the firm, and his private property cannot be attached by creditors.

On his attaining majority, he has to decide within six months whether he will become regular partner of withdraw from partnership. The choice in either case is to be intimated through a public notice, failing which he will be treated to have decided to continue as partner, and he becomes personally liable like other partners for all the debts and obligations of the firm from the date of his admission to its benefits (and not from the date of his attaining the age of majority). He also becomes entitled to file a suit against other partners for his share of profit and property.

7. Other partners:

In partnership firms, several other types of partners are also found, namely, secret partner who does not want to disclose his relationship with the firm to the general public. Outgoing partner, who retires voluntarily without causing dissolution of the firm, limited partner who is liable only up to the value of his capital contributions in the firm, and the like.However, the moment public comes to know of it he becomes liable to them for meeting debts of the firm. Usually, an outgoing partner is liable for all debts and obligations as are incurred before his retirement. A limited partner is found in limited partnership only and not in general partnership.

**Authorities, Rights and Liabilities of Partners**

The relationship of partners among themselves, their rights and obligations are generally given in the partnership deed. If partnership deed is silent about it, then the partners shall have rights and obligations mentioned in the Partnership Act.

Right of a Partner:

(i) Every partner has a right to take part in the conduct and management of the business.

(ii) Every partner has a right to be consulted before taking important decisions. The decisions should be taken by mutual consent. If the decisions are unimportant, then they can be enforced by majority, but consensus of all partners is necessary for taking important decisions.

(iii) The partners have a right to inspect books of accounts.

(iv) Every partner will have an equal share in profits, unless otherwise mentioned, in partnership deed.

(v) No new partner can be admitted into partnership without the consent of all partners.

(vi) Every partner has a right to receive interest at the rate of 6% per annum on the excess money supplied over his capital.

(vii) Every partner has a right to be indemnified by the firm in respect of expenses incurred or losses suffered for the normal conduct of the business.

(viii) A partner has a right to get the firm dissolved under appropriate circumstances.

(ix) The property of the firm shall be held and used exclusively for the purpose of the business.

Obligations of a Partner:

(i) Every partner should carry on the business to the greatest common advantage. He must perform his duties honestly and diligently.

(ii) A partner is not entitled to get remuneration for the conduct of business, unless otherwise it is specially mentioned in the partnership deed.

(iii) A partner must indemnify the firm for loss suffered because of his fraudulent conduct or willful neglect.

(iv) A partner is bound to keep and render true and correct accounts of the business.

(v) A partner cannot carry on a competing business. If he carries on such business he shall account for and pay to the firm all profits made by him in that business.

(vi) A partner is bound to act within the scope of his authority.

(vii) No partner can make a secret profit of the partnership business by way of commission, etc. If he does so, he must return the money to the firm.

*Rights of Partners:*
(a) Every partner has a right to take part in the conduct and management of business.

(b) Every partner has a right to be consulted and heard in all matters affecting the business of the partnership.

(c) Every partner has a right of free access to all records, books and accounts of the business, and also to examine and copy them.

(d) Every partner is entitled to share the profits equally.

(e) A partner who has contributed more than the agreed share of capital is entitled to interest at the rate of 6 per cent per annum. But no interest can be claimed on capital.

(f) A partner is entitled to be indemnified by the firm for all acts done by him in the course of the partnership business, for all payments made by him in respect of partnership debts or liabilities and for expenses and disbursements made in an emergency for protecting the firm from loss provided he acted as a person of ordinary prudence would have acted in similar circumstances for his own personal business.

(g) Every partner is, as a rule, joint owner of the partnership property. He is entitled to have the partnership property used exclusively for the purposes of the partnership.

(h) A partner has power to act in an emergency for protecting the firm from loss, but he must act reasonably.

(i) Every partner is entitled to prevent the introduction of a new partner into the firm without his consent.

(J) Every partner has a right to retire according to the Deed or with the consent of the other partners. If the partnership is at will, he can retire by giving notice to other partners.

(k) Every partner has a right to continue in the partnership.

(l) A retiring partner or the heirs of a deceased partner are entitled to have a share in the profits earned with the aid of the proportion of assets belonging to such outgoing partner or interest at six per cent per annum at the option of the outgoing partner (or his representative) until the accounts are finally settled.

*Duties of Partners:*

(a) Every partner is bound to diligently carry on the business of the firm to the greatest common advantage. Unless the agreement provides, there is no salary.

(b) Every partner must be just and faithful to the other partners.

(c) A partner is bound to keep and render true, proper, and correct accounts of the partnership and must permit other partners to inspect and copy such accounts.

(d) Every partner is bound to indemnify the firm for any loss caused by his willful neglect or fraud in the conduct of the business.

(e) A partner must not carry on competing business, nor use the property of the firm for his private purposes. In both cases, he must hand over to the firm any profit or gain made by him but he must himself suffer any loss that might have occurred.

(f) Every partner is bound to share the losses equally with the others.

(g) A partner is bound to act within the scope of his authority.

(h) No partner can assign or transfer his partnership interest to any other person so as to make him a partner in the business.

**Registration of Partnership, Dissolution of Partnership firm**

**Registration of Partnership**

A Partnership is one of the most important forms of a business organization, where two or more people come together to form a business and divide the profits thereof in an agreed ratio. A Partnership is easy to form, and the compliance is minimal as compared to companies.

**Name given to the Partnership firm**

Any name can be given to a partnership firm as long as you fulfill the below-mentioned conditions:

- The name shouldn't be too similar or identical to an existing firm doing the same business,
- The name shouldn't contain words like emperor, crown, empress, empire or any other words which show sanction or approval of the government.

**How should be the agreement between partners formed?**

Partnership deed is an agreement between the partners in which rights, duties, profits shares and other obligations of each partner is mentioned.

Partnership deed can be written or oral, although it is always advisable to write a partnership deed to avoid any conflicts in the future.

**Following details are required in a partnership deed:**

1. **General Details:**
2. Name and address of the firm and all the partners
3. Nature of business
4. Date of starting of business Capital to be contributed by each partner
5. Capital to be contributed by each partner
6. Profit/loss sharing ratio among the partners
7. **Specific Details:**

Apart from these, certain specific clauses may also be mentioned to avoid any conflict at a later stage:

1. Interest on capital invested, drawings by partners or any loans provided by partners to firm
2. Salaries, commissions or any other amount to be payable to partners
3. Rights of each partner, including additional rights to be enjoyed by the active partners
4. Duties and obligations of all partners
5. Adjustments or processes to be followed on account of retirement or death of a partner or dissolution of firm.
6. Other clauses as partners may decide by mutual discussion

**Is it necessary to register a partnership firm?**

Indian Partnership Act, 1932 governs the partnerships. Registration of partnership firm is optional and at the discretion of the partners.

Registration of partnership firm may be done at any time – before starting a business or anytime during the continuation of partnership.

It is always advisable to register the firm since a registered firms enjoy special rights which aren't available to the unregistered firms.

**How to register the partnership firm?**

An application form along with fees is to be submitted to Registrar of Firms of the State in which firm is situated. The application has to be signed by all partners or their agents.

**Documents to be submitted to Registrar are**

- Application for registration of partnership (Form 1)
- Specimen of Affidavit
- Certified original copy of Partnership Deed
- Proof of principal place of business (ownership documents or rental/lease agreement)

If the registrar is satisfied with the documents, he will register the firm in Register of Firms and issue Certificate of Registration.

Register of Firms contains up-to-date information on all firms and can be viewed by anybody upon payment of certain fees.

**Dissolution of Partnership firm**

Dissolving a partnership firm means discontinuing the business under the name of said partnership firm. In this case, all liabilities are finally settled by selling off assets or transferring them to a particular partner, settling all accounts existed with the partnership firm.

Any profit/ loss is transferred to partners in their profit sharing ratio as agreed by them in the partnership deed.

Dissolving a partnership firm is different from dissolving a partnership. In the former case, the firm ends its name and hence cannot do business in the future. But in case of dissolving a partnership, the existing partnership is dissolved– by consent or on happening of a certain event, but the firm can retain its existence if remaining partners enter into a new partnership agreement. There are different ways in which a partnership firm may get dissolved-

**When partners are mutually agreed**

It is the easiest way to dissolve a partnership firm since all partners have mutually agreed upon closing the partnership firm. Partners can give a mutual consent or may enter into an agreement for the dissolve.

**Compulsory Dissolution**

A firm may need to be dissolved compulsorily if:

- All partners or all partners except one partner are declared insolvent
- The firm is carrying unlawful activities like dealing in drugs or other illegal products or doing business with alien countries or other countries that may harm the interest of India or doing other such activities.

**Dissolution depending on certain contingent events**

Upon happening of certain events, a firm may be required to get dissolved:

- Expiry of fixed-term– Partnership formed for a fixed term will get dissolved once the term gets over.
- Completion of task– Sometimes, a partnership is formed for a certain task or objective. Once the task is completed, the partnership will automatically get dissolved.
- Death of the partner– If there are only two partners, and one of the partner dies, the partnership firm will automatically dissolve. If there are more than two partners, other partners may continue to run the firm. In such case, only the partnership will get dissolved, and other partners will enter into a new agreement.

**Dissolution by notice**

If a partnership business is at will, any partner can dissolve the partnership by giving an advanced notice. Notice will contain a date from which dissolution will be effective.

**Dissolution by Court**

If any of the partners becomes mentally unstable or misbehaves with the other partner(s) or doesn't abide by the clauses of the agreement, the other partner(s) may file a case in the court to dissolve the firm. But a court can dissolve the firm only if it is registered with the registrar of firms. Hence an unregistered partnership firm can't be dissolved by the court.

**Transfer of interest or equity to the third party**

If any partner transfers control in the form of interest or equity to a third party without consulting other partners, the partner(s) may dissolve the firm.

**Partners still liable to third parties**

Until a public notice of dissolution is given, partners remain liable for any act done by any of the partners which would have been an act of the firm, if such act was done before resolution.

If a partner has been declared insolvent or has retired from the firm, he will not liable for any acts done after his insolvency or retirement. The legal heirs of any deceased partner are also not liable for any acts done by other partners after the partner has died.

**How are accounts settled**

Accounts of the firm are settled in the following order–

- Losses of the firm will be paid out of the profits, next out of the capital of the partners, and even then, losses aren't paid off, losses will be divided among the partners in profit sharing ratios,
- Assets of the firm and the capital contributed by the partners to set-off losses of the firm will be applied in the following order–

1. Third party debts will be paid first
2. Next, loan amount taken by firm from any partner will be repaid to that partner
3. Capital contributed by each partner will be repaid to him in the capital contribution ratio
4. Balance amount will be shared among the partners in their profit sharing ratios.

- Upon realization, all assets will be sold off in the market, and the cash realizing out of such a sale will be used for paying the liabilities. Assets or liabilities may also be taken over by the partner(s) for which the respective partner capital accounts will be adjusted by such amount.

**Premium to be returned on premature dissolution**

If a partner paid a certain premium for entering into a partnership for a fixed term, and the firm is dissolved before the end of fixed term, the firm is liable to repay the partner his premium amount. But few conditions are attached with this –

- Firm isn't dissolving due to death of a partner
- Dissolution shouldn't be happening due to his misconduct
- Dissolution is happening on the basis of an agreement that contains no provision for repayment of full or a part of the premium.

# UNIT-3

Companies Act 2013: Meaning and Essential Feature of Company

**COMPANY LAW**

The word company is derived from a Latin word `companies`

it means a group of persons who took their need together.

In India law relating to companies are contained in The companies Act 1956.

**Meaning and definition**

A company is a voluntary association of persons formed for some common purpose with capital divisible into parts known as shares.

Justice Lindlay defines company "as an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business and who share the profits arising there from"

According to companies act a company means a company formed and registered under companies act.

**Features of a registered company**

1. **Voluntary Association**

A company is voluntary association of persons who have come together for a common object which generally is to earn profit.

The activities of this association are governed by the law and are limited by its memorandum of association

2. **Incorporated association**

A company comes into existence on incorporation or registration under the companies act. Minimum number of persons required for the purpose of incorporation is seven in case of a public company and two in case of a private company.

3. **Separate legal entity**

On incorporation company gets personality which is separate and distinct from those of its members. Company is an artificial person created by law.

4. **Separate property**

The company can own , enjoy and dispose off its property in its own name.

5. **Legal restrictions**

   The formation, working and winding up of a company are strictly governed by laws, rules and regulations

6. **Perpetual succession**

   unlike a person a company never dies. Its existence is not affected in any way by the death or insolvency of any shareholder. Members may come and members may go , but the company continues its operations until it is wound up.

7. **Common seal**

   As a company is an artificial person it cannot sign its name on a contract. So it function with the help of seal. All contract entered into by the members will be under the common seal of the company.

8. **Share capital**

   A company mobilizes its capital by selling its shares. Those persons who buy these shares become its share holders and thereby become members in it

9. **Limited Liability**

   In case of limited companies liability of members will be limited to the amount unpaid on the shares.

10. **Transferability of shares**

    Members can freely transfer and sell their shares .The right to transfer share is a statutory right of members.

11. **Ownership and management**

    The owners of a company are its share holders.

    The affairs of the company are managed by their representatives known as Directors

**Companies Act 2013: Types of Company**

**Type of companies**

**Companies can be classified on the basis of ;**

**A.** Incorporation

**B.** Liability of members

**C.** Number of members

**D.** Ownership

A. Incorporation

1. Chartered company
2. Statutory company
3. Registered company

1. **Chartered company**

The company which have formed and incorporated under a special charter granted by the king or queen.

Eg East India company. Bank of England.

2. **Statutory company**

These are companies which are created by means of a special Act of Parliament or any state legislature. Eg RBI, Railway

3. **Registered company**

Company formed and registered under companies Act 1956 is called Registered companies.

**B. Liability of members**

1. Limited company
2. Company limited by guarantee
3. Unlimited company

**1. Limited company or company limited by share**

Majority of registered companies will be company limited by shares. In case of limited companies liability of members will be limited to the amount unpaid on the shares.

**2. Company limited by guarantee**

Here liability of each member is limited by the memorandum to such amount as he may guarantee by the memorandum to contribute to the assets of the company in the event of its winding up.

Such companies are formed for the promotion of art science, culture, sports etc.

**3. Unlimited company**

A company not having any limit on the liability of its members is termed as unlimited company.

The members are liable for the debts of the company at the time of winding up.

**C. Number of members**

1. Private company
2. Public company

**1. Private company**

A private company is a company

-which restricts the right to transfer its shares.

-limits the number of its members to 50.

-prohibits any invitation to public to subscribe its shares.

**2. Public company**

A public company means a company which is not a private company

**E. Ownership**

1. Government Company
2. Foreign company
3. Holding and subsidiary company

**1. Government company**

A company is said to be Government Company when 51% of the paid up capital is held by the central government or by any state government or partly by central govt or partly by one or more state govt.

**2. Foreign company**

A foreign company is a company incorporated outside India and having a place of business in India.

**3. Holding and subsidiary company**

À Company which controls another company is known as the holding company and the so controlled company is known as subsidiary company.

**One Man Company**

This is a company in which one man holds practically the whole of the share capital of the company, and in order to meet the statutory requirement of minimum number of members some dummy members like his wife and son holds one or two shares each.

**Distinction between public company & private company.**

| | **Private Company** | **Public Company** |
|---|---|---|
| 1. | Minimum no of members is 2 | Minimum no of members is 7 |
| 2. | Maximum no members is 50 | No maximum limit |
| 3. | Minimum paid up capital is Rs 1 lakh | Minimum paid up capital is 5 lakh |
| 4. | Name must end with the word 'Pvt Ltd' | Name must end with the word 'Ltd' |
| 5. | Can commence business immediately after incorporation | It shall have to wait until it receive the certificate for commencement of business. |
| 6. | It cannot invite public to subscribe its shares and debentures | It can invite public to subscribe its shares and debentures |
| 7. | Minimum subscription is not required for allotment of shares. | Minimum subscription is required for allotment of shares. |
| 8. | Need not hold statutory meeting of the members. | It has to hold a statutory meeting and file a stat: report. |
| 9. | Quorum required for a meeting is 2. | Quorum required for a meeting is 5 |
| 10. | There is restriction of transfer of shares | Shares can be freely transferred. |
| 11. | Not required to issue prospectus. | Must issue prospectus. |
| 13. | Two directors | Three directors |

Companies Act 2013: Formation of Company

The procedure or formation of a company may be divided into four stages;

1. Promotion

2. Incorporation
3. Raising of capital
4. Commencement of business

**1. Promotion**

It is the first stage in the formation of a company.

In this stage the idea of carrying on a business is conceived by a person or a group of persons called promoters. They make detailed investigation about the workability of the idea, amt of capital required, operating expense etc etc..

Before a company an be formed, there must be some persons who have an intention to form a company and who take the necessary steps to carry that intention into operation. Such persons are called promoters.

The promoter is the person who brings a company into existence.

**2. Incorporation**

A company is said to be incorporated when it is registered with the registrar under the companies act. The certificate of incorporation is the birth certificate of the company. A company comes into existence from the date mentioned in the certificate.

**Procedure for registration**

The promoter has to first decide the proposed form of company as whether it is to be a public company or a private company.

They may form the company with limited liability , unlimited liability or limited by guarantee.

They have to decide the name of the company agreeable and desirable to all. For eg if the name proposed is identical with or closely resembles the name of an existing company , it is undesirable.

For getting registration an application has to be made to the registrar. The application shall be accompanied by the following **documents:**

1. Memorandum of association
2. Articles of association
3. A statement of nominal capital
4. A notice of address of the registered office of the company.
5. A list of directors and their consent to a act signed by them
6. A declaration that all the requirements of the act have been complied with. Such declaration shall be signed by an advocate of high court or supreme court or a chartered accountant who is engaged in the formation of company

**Certificate of incorporation**

If the registrar is satisfied that all the requirements of the act have been complied with he shall register the company and issue a certificate of incorporation.

**Conclusive proof**

Once a company is registered incorporation cannot be challenged subsequently. The certificate of incorporation is a conclusive evidence of the fact that-

1. all the requirements of the act have been complied with.
2. company is duly registered.
3. company came into existence on the date of certificate.

**Advantages of incorporation**

1. Transferability of shares
2. Separate legal entity
3. Perpetual succession
4. Common seal
5. Separate property
6. Capacity to sue

**3. Raising of capital**

After incorporation a company can raise capital by issuing shares. A private company cannot issue shares to public.

In case of public company a copy of prospectus is filed with the registrar and it will be issued to the public. Those who are intended in purchasing share are required to send their application money to company's banker.

On the last date fixed for the receipt of application if the company has received application equal to minimum subscription the directors will start with allotment of shares.

**4. Commencement of business**

A private company may commence its business immediately after incorporation.

But a public company cannot commence business immediately after incorporation but it has to obtain a certificate of commencement from the registrar.

**Memorandum and Articles of Association, Prospectus**

**MEMORANDUM OF ASSOCIATION**

Memorandum of association for a company is like the constitutional law for a country. It is the document which contains the rules regarding constitution and activities of the company. It is a fundamental charter of the company.

It defines the extent of powers of the company, beyond that it cannot go. It is a document filed at the time of incorporation.

It is a public document ie any interested public can get a copy on payment of prescribed fees.

**Contents of memorandum**

1. Name clause
2. Registered office clause
3. Object clause
4. Liability clause
5. Capital clause
6. Association clause or subscription clause.

**1.Name clause**

The first clause of memorandum requires a company to state its name

Rules:-Should not adopt identical with or resembles that of an existing company. Ltd for public company and Pvt Ltd for private company. Should not use a name prohibited by the Name and Emblems Act.

2. **Registered office clause**

The memorandum must specify the state in which the registered office of the company is to be situated.

3. **Object clause**

This is the most important clause of the memorandum of association. It defines the object of the company and the extent of its powers. The object of the company must be state very clearly and a company cannot do anything beyond object clause. The objects of the company shall not be illegal or against public policy.

4. **Liability clause**

This clause state the nature of liability of members.

5. **Capital clause**

This clause contains the total amount of capital with which the company is registered. This capital is known as authorized capital or nominal capital or registered capital.

6. **Association clause or subscription clause**

The memorandum concludes with subscription clause. The memorandum must be subscribed by at least 7 persons in case of public company and 2 in case of private company. Each subscriber must sign the document and write the number of shares taken by him.

**ALTERATION OF MEMORANDUM**

The alteration of the memorandum is possible only by strictly following the procedure laid down in the Act

1. **Alteration of a name clause**

The name of a company can be changed by passing a special resolution and with approval of central govt. If a company is registered with a name which is in the opinion of central govt is identical with or too closely resemble to the name of an existing company, it can be changed by passing an ordinary resolution but with the approval of central govt .

2. **Alteration of registered office clause**

If the shift of office is within local limits, ie from one place to another place in the same city , town or village that can be done by giving a notice of change to registrar.

If the shift is outside local limits, a special resolution has to be passed.

If the shift is from the jurisdiction of one registrar to another's the special resolution should be confirmed by the regional director of the state. (new sec 17 A Amendment Act 2000)

3. **Alteration of object clause**

The alteration of object clause is subject to so many restrictions. A company may change its objects for the following purposes;

1. To carry business more economically or more efficiently.
2. To attain its main purposes by new or improved means.
3. To enlarge or change local area of operation
4. To restrict or abandon any of its objects specified in the memorandum.
5. To amalgamate the company with any other company.
6. to sell or dispose of the whole or any part of the undertaking of the company.

–A special resolution and approval of company law board is necessary for alteration.

4. **Alteration of liability clause**

Liability clause cannot be altered so as to make the liability of members unlimited.

5. **Alteration of capital clause**

Alteration can be made to

**1.** To increase share capital

**2.**To convert fully paid share to stock

**3**.Cancellation of shares etc

**Doctrine of ultra vires**

Memorandum contains the rules regarding constitution and activities of the company. It is a fundamental charter of the company. It defines the extent of powers of the company, beyond that it cannot go.

A co can act and function within the limits of memorandum. Any act which is beyond the memorandum is ultra vires the company. Such acts are void .

Ultra means beyond and vires means powers. So ultra vires means 'beyond powers'.

The purpose of this doctrine is to helps the shareholders , creditors and every third person dealing with the company to ensure that their investment are not diverted to unauthorized objects.

**ARTICLES OF ASSOCIATION**

Articles of association are the internal regulations of the company and are for the benefit of shareholders. These are the rules and regulation relating to the internal management of a company. The article define the mode and form on which the business of the company is to be carried on.

**Companies Directors: Appointment, Power**

**Appointment**

**SECTION 152 OF THE COMPANIES ACT, 2013 – APPOINTMENT OF DIRECTOR**

An individual who is appointed or elected as the member of the board of Directors of a Company, who, along with the other directors, has the responsibility for determining and implementing the policies of the company.

Director is an individual who directs, manages, oversees or controls the affairs of the Company.

A director is a person who is appointed to perform the duties and functions of a company in accordance with the provisions of The Company Act, 2013.

As per Section 149(1): Every Company shall have a Board of Directors consisting of Individuals as director.

They play a very important role in managing the business and other affairs of Company. Appointment of Directors is very crucial for the growth and management of Company.

**APPOINTMENT OF DIRECTORS UNDER COMPANIES ACT 2013:**

| TYPE OF COMPANY | APPOINTMENT MADE |
|---|---|
| Public Company or a Private Company subsidiary of a public company | 1. 2/3 of the total Directors appointed by the shareholders.<br><br>2.Remaining 1/3 appointment is made as per Articles and failing which, shareholders shall appoint the remaining. |
| Private Company which is not a subsidiary of a public company | 1. Articles prescribe manner of appointment of any or all the Directors.<br><br>2. In case, Articles are silent, Directors must be appointed by the shareholders |

*Nominee Directors can be appointed by a third party or by the Central Government in the case of oppression or mismanagement.

**REQUIREMENT OF A COMPANY TO HAVE BOARD OF DIRECTORS:**

| Private Limited Company | Minimum Two Directors |
|---|---|
| Public Limited Company | Minimum Three Directors |

| one person Company | Minimum One Director |
|---|---|

* A company may appoint more than (15) fifteen Directors after passing a special resolution.

*Further, every Company should have one Resident Director (i.e. a person who has lived at least 182 days in India during the financial year)

Director's appointment is covered under section 152 of Companies Act, 2013, along with Rule 8 of the **Companies (Appointment and Qualification of Directors) Rules, 2014.**

**QUALIFICATIONS FOR DIRECTORS:**

According to The Companies Act no qualifications for being the Director of any company is prescribed. The Companies Act does, however, limit the specified share qualification of Directors which can be prescribed by a public company or a private company that is a subsidiary of a public company, to be five thousand rupees (Rs. 5,000/-).

**New Categories of Director**

**Resident Director:**

This is one of the most important changes made in the new regime, particularly in respect of the appointment of Directors under section 149 of the Companies Act, 2013. It states that every Company should have at least one resident Director i.e. a person who has stayed in India for not less than 182 days in the previous calendar year.

**Woman Director**

Now the legislature has made mandatory for certain class of the company to appoint women as director. As per section 149, prescribes for the certain class of the company their women strength in the board should not be less than 1/3. Such companies either listed company and any public company having-

1. Paid up capital of Rs. 100 cr. or more, or
2. Turnover of Rs. 300 cr. or more.

**Foreign National as a Director under Companies Act, 2013**

Under Indian Companies Act, 2013, there is no restriction to appoint a foreign national as a director in Indian Companies along with six types of Directors which are appointed in a company, i.e., Women Director, Independent Director, Small Shareholders Director, Additional Director, Alternative and Nominee Director. By complying with the Companies Act, 2013 (hereinafter referred as "The Act") read along with the Companies (Appointment and Qualifications of Directors) Rules, 2014 (hereinafter referred as "The Rules")

**Restrictions on number of Directorships**

The Companies Act prevents a Director from being a Director, at the same time, in more than fifteen (15) companies. For the purposes of establishing this maximum number of companies in which a person can be a Director, the following companies are excluded:

A "pure" private company;

An association not carrying on its business for profit, or one that prohibits the payment of any dividends; and

A company in which he or she is only appointed as an Alternate Director.

Failure of the Director to comply with these regulations will result in a fine of fifty thousand rupees (Rs. 50,000/-) for every company that he or she is a Director of, after the first fifteen (15) so determined.

**Power**

The directors are considered as the head and brain of a company. When the brain functions, the company is said to function. For the proper functioning, the directors should be properly entrusted with some powers. The directors generally acquire their powers from the provisions of the Articles of Association and then from the Companies Act.

1. **General Powers of a Company Director**

As per Sec. 291 of the Act, the Board is entitled to exercise all such powers and to do all such acts and things as the company is authorized to do. The exceptions are the acts, which can be done by the company only in the general meetings of the members as required by law.

**Specific Powers of a Company Director**

A) As per Sec. 262, in the case of a public company or a private company, which is a subsidiary of a public company, the power to fill a casual vacancy of directors is to be exercised at a Board meeting.

B) As per Sec. 292, the following powers of the company shall be exercised by the Board by means of resolution passed at the meeting of the Board:

- To make calls,
- To issue debentures,
- To borrow moneys by other means,
- To invest the funds of the company, and
- To make loans.

The last three powers cannot be delegated to the Manager or to a Committee of Directors but must be exercised only at a Board meeting.

3. **Powers of Director subject to the Consent of the Company**

The directors of a public company or of a private company can exercise the following powers, which is a subsidiary of a public company only with the consent of the company in the general meeting:

- To sell, lease or otherwise dispose of the undertaking of the company.
- To remit or give time for repayment of any debt due to the company by a director.
- To invest the sale proceeds of any property of the company in securities other than trust securities.
- To borrow moneys where the moneys already borrowed (other than temporary) exceeds the total of the paid-up capital and free reserves of the company.
- To contribute to charities and other funds not directly relating to the business of the company or to the welfare of the employees in any year in excess of Rs.50,000 or 5% of the average net profits of the three preceding financial years whichever is greater.

4. **Powers of Director subject to the Consent of the Central Government**

A) As per Sec. 268, any provision relating to the appointment or reappointment of a Managing Director can be altered by the Board with the consent of the Central Government.

B) As per Sec. 295, the Board, subject to the Central Government's consent, has the power to appoint a person for the first time as a Managing Director.

C) As per Sec. 295, the Board, only with the previous approval of the Central Government, can make any loan or give any guarantee or provide any security in connection with a loan made by any other person to:

- Any of its directors or any director of its holding company, or
- Any partner or relative of such director, or
- Any firm in which any such director or relative is a partner, or
- Any private company of which any such director is a member or director, or
- Anybody corporate, 25% or more of whose total voting power may be exercised or controlled by any such director or two or more directors together, or
- Anybody corporate, whose Board or Managing director or Manager is accustomed to act in accordance with the directions or instructions of any director or directors of the leading company.

Subject to the approval of the Government, the Board has the power to invest in the shares of another company in excess of the limits specified in Sec. 372.

**Duties of Directors**

The position of Director of a **Private Limited Company** or **Limited Company** or **One Person Company** comes with certain duties and responsibilities. Many Directors of a Company are unaware of these duties and responsibilities expected of them and hold the position just as a namesake. Our intention with this article is to change that mindset and create awareness about the duties and responsibilities of a Director of a Company. This will in turn help create companies that have a strong and ethical Board of Directors, thereby benefitting all the stakeholders of a company.

**Duty to act in the best interests of the Company**

Directors are in a fiduciary position in relation to the company. So the Director must exercise his/her power for the benefit of the company or in the best interest of the company. A Director must also consider the interests of the company supreme and, in any case, above their personal interest. Therefore, a Director acting honestly but not in the best interests of the company is in breach of duty.

***Fiduciary:*** *A fiduciary is a person who holds a legal or ethical relationship of trust. Typically, a fiduciary prudently takes care of money for another person.*

**Duty NOT to misapply company assets**

Directors do not have legal ownership of the company's assets. They only have effective control of them, and they must use them and employe them for the proper purposes of the company, and in the best interests of the company.

**Duty NOT to make secret profits**

A Director holds a key position in relation to the company. Therefore, in the course of management of the business, the Director may get confidential and sensitive information concerning the company's business and affairs, or trade secrets. This privileged information cannot be used by the Director for his/her personal benefit and gain to the detriment of the company.

**Duty of confidentiality**

Directors would have access to all the relevant information about the operations and financials of a company. However, a Director has a duty to ensure that such information is not, directly or indirectly, divulged. A Director must not disclose or make use of that confidential information for any purpose other than for the benefit of the company.

**Duty to NOT permit conflict of interest**

A Director of a company has a duty to not enter into any arrangement which will possibly impair the Director's interest and cause conflict of interest with the Company. A conflict of interest arises when a person is in a position to derive personal benefit from actions or decisions made in their official capacity.

**Duty to attend meetings**

A Director of a company must make best efforts to attend as many board meetings as circumstances permit. In India, if a Director is absent from three consecutive meetings of the Board, or from all meetings held in three months, whichever is longer, without obtaining leave of absence from the Board, then the Director could lose his/her Directorship in the Company.

**Duty NOT to exceed powers**

The **Memorandum of Association (MOA) of a Company** states what the company is authorized to do. Whereas, the **Articles of Association (AOA)** of the Company state what powers are given to the Directors of the Company. It is the duty of the Directors to ensure that not only do they keep within the company's powers but also that hey keep within the powers actually given to them in the Articles of Association.

**Company Resolutions and Types**

A resolution is the final form of a decision taken at a meeting by voting on a motion, with or without amendment.

**A Resolution must not be confused with a motion:**

A motion is considered at a meeting, a resolution is the outcome of the discussion. A resolution is binding on the organisation. It becomes effective when it is passed but minutes make the evidence of such resolution. Sometimes there is a legal formality, as we find in the Companies Act, to file a copy of a resolution with some appropriate authority (e.g., the Registrar of Companies) to make it effective.

*Rules Regarding Resolution:*
Every association has to function guided by the resolutions adopted at the meetings at different levels—resolutions passed at general meetings, at executive meetings and at committee meetings, if any. In an Assembly or in Parliament proposed Bills are passed in the forms of resolutions which become the Acts subsequently. Therefore, the importance of resolutions is immense. Certain rules have to be strictly observed for passing resolutions.

**They are:**

(1) The drafting of a resolution has to be carried out with great care so that the purport or meaning of the resolution is easily and clearly understandable and there is no ambiguity (double meaning). The secretary, who is supposed to be an expert in the line, helps in the drafting process. The motion itself shall be drafted in such a manner that it can be adopted as a perfect resolution. This is particularly true for a formal resolution.

(2) There are different styles and forms of drafting a resolution. Any one style can be followed. It is desirable that a formal resolution is drafted in a specialized style.

(3) A resolution must be entered in the Minute Book in verbatim, i.e., word for word.

(4) Once a resolution is passed it cannot be revoked or cancelled either at the same meeting or at any subsequent meeting by passing another resolution.

Types of Resolutions:

**Broadly speaking, resolutions are of two types:**

**(1) Ordinary Resolution:**

**This type of resolution has the following characteristics:**

(a) This can be passed by a simple majority of votes and even by a margin of one vote. It can be passed (or lost) by the casting vote of the chairman.

(b) This type of resolution is necessary to take decisions on ordinary matters of the association.

(c) This is the most common type of resolution.

(d) Formalities for passing such a resolution (unlike a special resolution) are not so strict.

**(2) Special Resolution:**

**This type of resolution has the following characteristics:**

(a) It needs a specific margin of votes to be passed. For example—Two-thirds majority or three- fourths majority. Every association in its bye-laws mentions what shall be the margin. There may be statutory rules too. For example, the Companies Act states that there shall be three-fourths majority out of the members present (in person or by proxy) and voting. According to our Constitution, any Article of the Constitution can be altered by two-thirds majority of all the members of Parliament.

(b) Such resolutions are necessary when any decision has to be taken affecting the very constitution of the organisation, e.g., altering the objects of the organisation

(c) This type of resolution is not commonly necessary.

(d) There may be strict formalities to be followed for the purpose (as found in the Companies Act).

Concept of types of resolutions comes mostly from the Companies Act. There are various types of resolutions mentioned in the Companies Act, mainly applicable to members' meetings.

**Resolutions as found in the Companies Act:**

**(1) Ordinary Resolution:**

According to Sec. 189(1), an ordinary resolution is that which can be passed at a general meeting by simple majority (including a casting vote of the chairman, if any), votes being cast by the members present either in person or by proxy and either by show of hands or by poll.

**(2) Special Resolution:**

According to Sec. 189(2), a special resolution is that which can be passed at a general meeting, votes being cast by the members present either in person or by proxy and either by show of hands or by poll, provided that (a) in the agenda it is mentioned that the resolution shall be passed as a special resolution, (b) a notice has been duly issued and (c) three-fourth of the votes cast are in favour of the resolution.

It has to be noted that at a Board meeting there is no question of any special resolution. But, sometimes to pass a particular type of resolution the consent of all the directors present is necessary. (In the past, special resolution was known as extraordinary resolution).

**(3) Resolution with Special Notice:**

According to the Companies Act, certain resolutions require a special notice for their validity. The resolution itself may be passed as an ordinary resolution. The notice for a members' meeting is prepared and issued by the Board of Directors (the secretary does it in practice) and the agenda is included in the notice.

If any member who wants to move any motion at the meeting must be given the opportunity to do it and generally for that this Section has been provided. According to Sec. 190, certain resolutions, as wanted by the Act or as mentioned in the articles, require special notice.

It means that a member, intending to move a resolution, shall give a notice to the company at least fourteen days before the meeting and the company shall circulate the notice of the resolution to all the members at least seven days before the meeting.

Suppose, a director is to retire by rotation and his name has been mentioned in the notice as offering for re-election A member wants to propose the name of another person. He must send the name of that person at least fourteen days before the meeting and the company shall circulate the name at least seven days before the meeting (Sec. 257).

**(4) Resolution by Circulation:**

The Board of Directors of a Company (or the members of a committee appointed out of the directors of a company) may pass a resolution without holding a meeting. This can be done by circulating a draft of the resolution together with necessary papers, if any, to all the directors (or the members of the committee) at their usual address in India, and who are in India.

**The resolution is deemed to be passed provided:**

(a) The all or the majority have approved it and

(b) The total number of directors then in India is not less than the quorum (Sec. 289).

**(5) Resolutions to be filed:**

Copies of some resolutions, e.g., as resolution on change of any clause of any document, have to be filed with the Registrar (Sec. 192).

**Meeting and Types**

A meeting therefore, can be defined as a lawful association, or assembly of two or more persons by previous notice for transacting some business. The meeting must be validly summoned and convened. Such gatherings of the members of companies are known as company meetings.

Essentials of Company Meetings

The essential requirements of a company meeting can be summed up as follows:

1. **Two or More Persons**: To constitute a valid meeting, there must be two or more persons. However, the articles of association may provide for a larger number of persons to constitute a valid quorum.
2. **Lawful Assembly**: The gathering must be for conducting a lawful business. An unlawful assembly shall not be a meeting in the eye of law.
3. **Previous Notice**: Previous notice is a condition precedent for a valid meeting. A meeting, which is purely accidental and not summoned after a due notice, is not at all a valid meeting in the eye of law.
4. **To Transact a Business**: The purpose of the meeting is to transact a business. If the meeting has no definite object or summoned without any predetermined object, it is not a valid meeting. Some business should be transacted in the meeting but no decision need be arrived in such meeting.

Kinds of Company Meetings

The meetings of a company can be broadly classified into four kinds.

- Meetings of the Shareholders.
- Meetings of the Board of Directors and their Committees.
- Meetings of the Debenture Holders.
- Meetings of the Creditors.

1. **Meeting of the Share Holders**

The meetings of the shareholders can be further classified into four kinds namely,

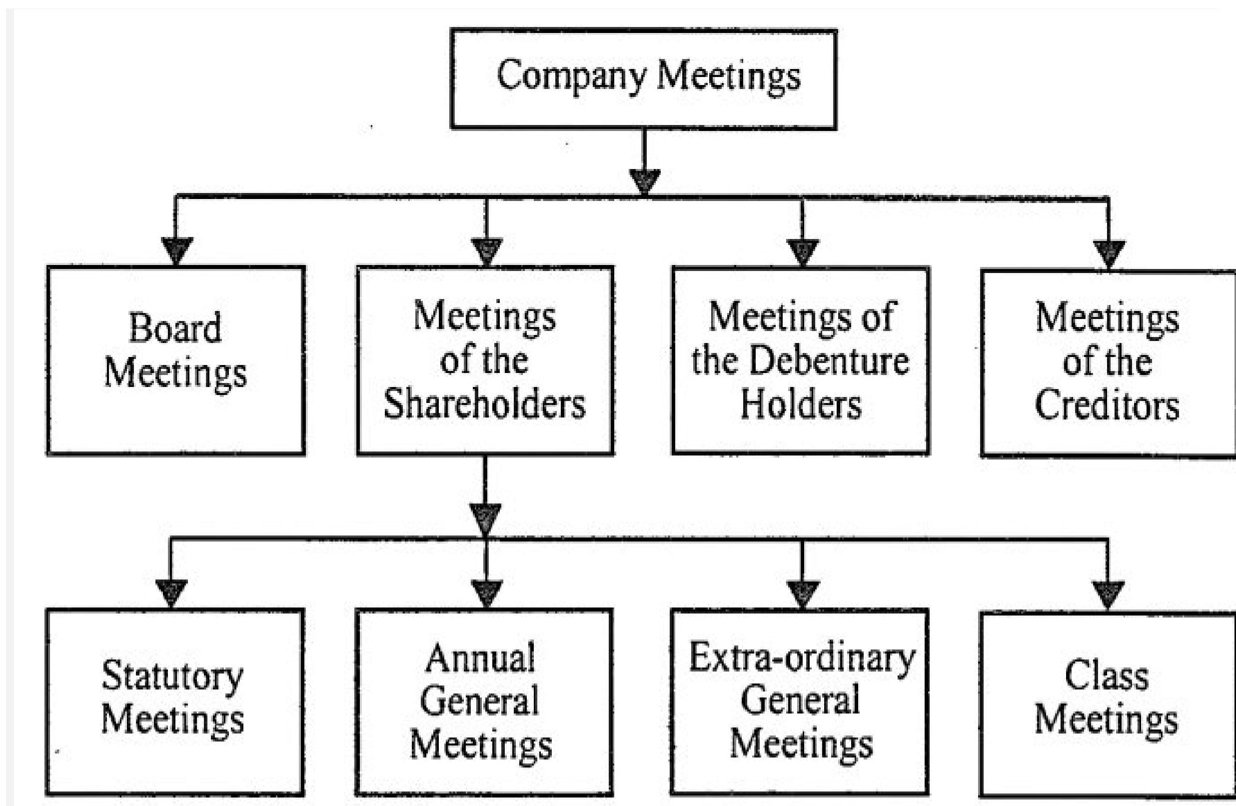
- Statutory Meeting,
- Annual General Meeting,
- Extraordinary General Meeting, and
- Class Meeting.

The chart given below gives a classification of company meetings.

*1. Statutory Meeting*

This is the first meeting of the shareholders conducted after the commencement of the business of a public company. Companies Act provides that every public company limited by shares or limited by guarantee and having a share capital should hold a meeting of the shareholders within 6 months but not earlier than one month from the date of commencement of business of the company.

Usually, the statutory meeting is the first general meeting of the company. It is conducted only once in the lifetime of the company. A private company or a public company having no share capital need not conduct a statutory meeting.




***Kinds of Company Meetings***

*2. Annual General Meeting*

The Annual General Meeting is one of the important meetings of a company. It is usually held once in a year. AGM should be conducted by both private and public ltd companies whether limited by shares or by guarantee; having or not having a share capital. As the name suggests, the meeting is to be held annually to transact the ordinary business of the company.

*3. Extra-ordinary General Meetings (EOGM)*

Statutory Meeting and Annual General Meetings are called the ordinary meetings of a company. All other general meetings other than these two are called Extraordinary General Meetings. As the very name suggests, these meetings are convened to deal with all the extraordinary matters, which fall outside the usual business of the Annual General Meetings.

EOGMs are generally called for transacting some urgent or special business, which cannot be postponed till the next Annual General Meeting. Every business transacted at these meetings is called Special Business.

**PERSONS AUTHORIZED TO CONVENE THE MEETING**

The following persons are authorized to convene an extraordinary general meeting.

- The Board of Directors.
- The Requisitionists.
- The National Company Law Tribunal.
- Any Director or any two Members.

*4. Class Meetings*

Class meetings are those meetings, which are held by the shareholders of a particular class of shares e.g. preference shareholders or debenture holders.

Class meetings are generally conducted when it is proposed to alter, vary or affect the rights of a particular class of shareholders. Thus, for effecting such changes it is necessary that a separate meeting of the holders of those shares is to be held and the matter is to be approved at the meeting by a special resolution.

For example, for cancelling the arrears of dividends on cumulative preference shares, it is necessary to call for a meeting of such shareholders and pass a resolution as required by Companies Act. In case of such a class meeting, the holders of other class of shares have no right to attend and vote.

2. Meetings of the Directors

Meetings of directors are called Board Meetings. These are the most important as well as the most frequently held meetings of the company. It is only at these meetings that all important matters relating to the company and its policies are discussed and decided upon.

Since the administration of the company lies in the hands of the Board, it should meet frequently for the proper conduct of the business of the company. The Companies Act therefore gives wide discretion to the directors to frame rules and regulations regarding the holding and conduct of Board meetings.

The directors of most companies frame rules concerning how, where and when they shall meet and how their meetings would be regulated. These rules are commonly known as Standing Orders.

3. Meetings of Debenture Holders

The debenture holders of a particular class conduct these meeting. They are generally conducted when the company wants to vary the terms of security or to modify their rights or to vary the rate of interest payable etc. Rules and Regulations regarding the holding of the meetings of the debenture holders are either entered in the Trust Deed or endorsed on the Debenture Bond so that they are binding upon the holders of debentures and upon the company.

4. Meetings of the Creditors

Strictly speaking, these are not meetings of a company. They are held when the company proposes to make a scheme of arrangements with its creditors. Companies like individuals may sometimes find it necessary to compromise or make some arrangements with their creditors, In these circumstances, a meeting of the creditors is necessary.

# UNIT-4

**Sales and Good Act, 1930 Meaning and Essential Elements of Contract of Sale**

Till 1930, transactions relating to sale and purchase of goods were regulated by the Indian Contract Act, 1872.In 1930,Sections 76 to 123 of the Indian Contract Act, 1872 were repealed and a separate Act called 'The Indian Sale of Goods Act,1930 was passed. It came into force on 1st July,1930.With effect from 22ndSeptember,1963,the word 'Indian'was also removed.Now,the present Act is called' The sales of goods act,1930'. This Act extends to the whole of India except the State of Jammu and Kashmir.

**Scope of the Act**

The sale of Goods Act deals with 'Sale of Goods Act,1930,'contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." 'Contract of sale' is a generic term which includes both a sale as well as an agreement to sell.

**Essential elements of Contract of sale**

1. **Seller and buyer**

   There must be a seller as well as a buyer.'Buyer' means a person who buys or agrees to buy goods[Section 2910].'Seller' means a person who sells or agrees to sell goods [Section 29(13)].

2. **Goods**

   There must be some goods.'Goods' means every kind of movable property other than actionable claims and money includes stock and shares,growing crops,grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale[Section 2(7)].

3. **Transfer of property**

   Property means the general property in goods,and not merely a special property[Section 2(11)]. General property in goods means ownership of the goods. Special property in goods means possession of goods.Thus,there must be either a transfer of ownership of goods or an agreement to transfer the ownership of goods.The ownership may transfer either immediately on completion of sale or sometime in future in agreement to sell.

4. **Price**

   There must be a price.Price here means the money consideration for a sale of goods[Section 2(10)].When the consideration is only goods,it amounts to a 'barter' and not sale.When there is no consideration ,it amounts to gift and not sale.

5. **Essential elements of a valid contract**

In addition to the aforesaid specific essential elements,all the essential elements of a valid contract as specified under Section 10 of Indian Contract Act,1872 must also be present since a contract of sale is a special type of a contract.

**Sales and Good Act 1930: Conditions and Warranties**

It is usual for both seller and buyer to make representations to each other at the time of entering into a contract of sale. Some of these representations are mere opinions which do not form a part of contract of sale.Whereas some of them may become a part of contract of sale.Representations which become a part of contract of sale are termed as stipulation which may rank as condition and warranty e.g. a mere commendation of his goods by the seller doesn't become a stipulation and gives no right of action to the buyer against the seller as such representations are mere opinion on the part of the seller.But where the seller assumes to assert a fact of which the buyer is ignorant,it will amount to a stipulation forming an essential part of the contract of sale.

**Meaning of Conditions [Section 12(2)]**

A condition is a stipulation

1. Which is essential to the main purpose of the contract
2. The breach of which gives the aggrieved party a right to terminate the contract.

**Meaning of Warranty[Section 12(3)]**

A warranty is a stipulation

1. Which is collateral to the main purpose of the contract
2. The breach of which gives the aggrieved party a right to claim damages but not a right to reject goods and to terminate the contract.

Difference between Conditions and Warranty

| Sr. No. | Basis of distinction | Condition | Warranty |
|---|---|---|---|
| 1. | Essential vs. Collateral | It is a stipulation which is essential to the main purpose of the contract. | It is a stipulation which is only collateral to the main purpose of the contract. |
| 2. | Right in case of breach | The aggrieved party can terminate the contract. | The aggrieved party can claim damages but cannot terminate contract. |
| 3. | Treatment | A breach of condition can be treated as a breach of warranty. | A breach of warranty cannot be treated as breach of condition. |

**Conditions to be treated as Warranty[Section 13]**

In the following three cases a breach of a condition is treated as a breach of a warranty:

1. Where the buyer waives a conditions; once the buyer waives a conditions,he cannot insist on its fulfillment e.g. accepting defective goods or beyond the stipulated time amount to waiving a conditions.
2. Where the buyer elects to treat breach of the condition as a breach of warranty;e.g. where he claims damages instead of repudiating the contract.
3. Where the contract is not severable and the buyer has accepted the goods or part thereof,the breach of any condition by the seller can only be treated as breach of warranty.It can not be treated as a gorund for rejecting the goods unless otherwise specified in the contract.Thus,where the buyer after purchasing the goods finds that some condition is not fulfilled,he cannot reject the goods.He has to retain the goods entitling him to claim damages.

**Express and Implied Conditions and Warranties**

In a contract of sale of goods,conditions and warranties may be express or implied.

1. **Express Conditions and Warranties.**

These are expressly provided in the contract.For example,a buyer desires to buy a Sony TV Model No. 2020.Here,model no. is an express condition.In an advertisement for Khaitan fans,guatantee for 5 years is an express warranty.

2. **Implied Conditions and Warranties**

These are implied by law in every contract of sale of goods unless a contrary intention appears from the terms of the contract.The various implied conditions and warranties have been shown below:

**Implied Conditions**

1. **Conditions as to title [ Section 14 (a)]**

There is an implied condition on the part of the seller that

- In the case of a sale,he has a right to sell the goods,and
- In the case of an agreement to sell,he will have a right to sell the goods at the time when the property is to pass.

2. **Condition in case of sale by description [Section 15]**

Where there is a contract of sale of goods by description,there is an implied condition that the goods shall correspond with description.The main idea is that the goods supplied must be same as were described by the seller.Sale of goods by description include many situations as under:

1. Where the buyer has never seen the goods and buys them only on the basis of description given by the seller.

2. Where the buyer has seen the goods but he buys them only on the basis of description given by the seller.

   iii. Where the method of packing has been described.

3. **Condition in case of sale by sample [Section 17]**

   A contract of sale is a contract for sale by sample when there is a term in the contract, express or implied,to that effect.Such sale by sample is subject to the following three conditions:

1. The goods must correspond with the sample in quality.
2. The buyer must have a reasonable opportunity of comparing the bulk with the sample.

- The goods must be free from any defect which renders them unmerchantable and which would not be apparent on reasonable examination of the sample.Such defects are called latent defects and are discovered when the goods are put to use.

4. **Condition in case of sale by description and sample [Section 15]**

   If the sale is by sample as well as by description, the goods must correspond with the sample as well as the description.

5. **Condition as to quality or fitness [Section 16(1)]**

   There is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.In other words,the buyer must satisfy himself about the quality as well as the suitability of the goods.

   **Exception to this rule:**

   There is an implied condition that the goods shall be reasonably fit for a particular purpose described if the following three conditions are satisfied:

1. The particular for which goods are required must have been disclosed(expressly or impliedly) by the buyer to the seller.
2. The buyer must have relied upon the seller's skill or judgement.

- The seller's business must be to sell such goods.

6. **Condition as to merchantable quality[Section 16(2)]**

   Where the goods are bought by description from a seller who deals in goods of that description,there is an implied condition that the goods shall be of merchantable quality.The expression ' merchantable quality' means that the quality and condition of the goods must be such that a man of ordinary prudence would accept them as the goods of that description.Goods must be free from any latent or hidden defects.

7. **Condition as to wholesomeness**

In case of eatables or provisions or foodstuffs,there is an implied condition as to wholesomeness.Condition as to wholesomeness means that the goods shall be fit for human consumption.

8. **Conditions implied by custom [Section 16(3)]**

   Condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Implied warranties

**a) Warranty as to quiet possession [Section14(b)]**

There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.The reach of this warranty gives buyer a right to claim damages from the seller.

**b) Warranty of freedom from encumbrances [Section 14(c)]**

There is an implied warranty that the goods are free from any charge or encumbrance in favour of any third person if the buyer is not aware of such charge or encumbrance.The breach of this warranty gives buyer a right to claim damages from the seller.

1. Warranty as to quality or fitness for a particular purpose annexed by usage of trade[Section 16(3)]
2. Warranty to disclose dangerous nature of goods

**In case of goods of dangerous nature the seller fails to do so, the buyer may make him liable for breach of implied warranty.**

**Sales and Good Act 1930: Rights of Unpaid Seller**

**Unpaid seller and his rights**

Meaning of an Unpaid Seller [Sec 45(1)(2)]

The seller of goods is deemed to be an 'unpaid seller'

1. When the whole of the price has not been paid or tendered
2. When a bill of exchange or other negotiable instrument (such as cheque) has been received as conditional payment, and it has been dishonored [Section 45(1)].
3. The term 'seller' includes any person who is in the position of a seller(for instance,an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid,or is directly responsible for the price) [Section 4592)].

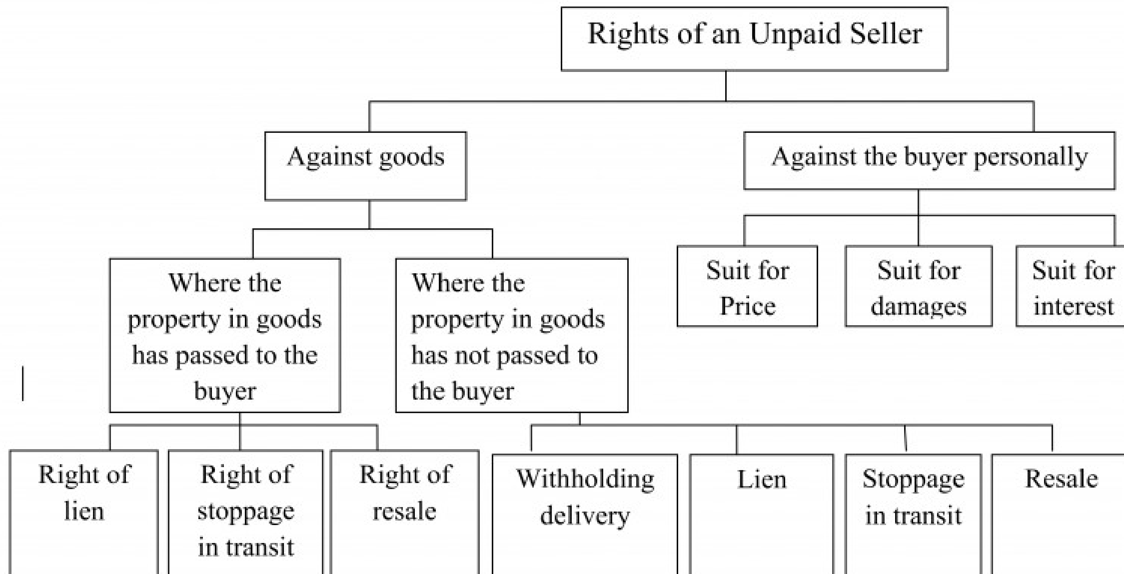
Rights of an Unpaid Seller [Section 46-52,54-56,60-61]

The rights of an unpaid seller can broadly be classified under the following two categories:

1. Rights against the goods

   Rights against the buyer personally

   **The various rights of an unpaid seller have been shown in Fig.**




**(I) Rights against the goods where the property in the goods has passed to the buyer**

**a) Right of Lien [Section 47,48 and 49]**

**Meaning of Right of Lien:**

The right of lien means the right to retain the possession of the goods until the full price is received.

**Three circumstance under which right of lien can be exercised [Section 47(1)]**

1. Where the goods have been sold without any stipulation to credit;
2. Where the goods have been sold on credit, but the term of credit has expired;
3. Where the buyer becomes insolvent.

**Other provisions regarding right of lien [Sections 47(2), 48, 49(2)]**

1. The seller may exercise his right of lien, even if he possesses the goods as agent or Bailee for buyer[Section 47(2)]
2. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show agreement to waive the lien [Section 48].
3. The seller may exercise his right of lien even though he has obtained a decree for the price of the goods [Section 49(2)].

**Circumstances under which right of lien in the following cases:**

1. When he delivers the goods to a carrier or other Bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods [Section 49(1)(a)].
2. When the buyer or his agent lawfully obtains possession of the goods [Section 49(1)(b)]
3. When the seller waives his right of lien [Section 49(1) (c)].
4. When the buyer disposes of the goods by sale or in any other manner with the consent of the seller [Section 53(1)].
5. Where document of title to goods has been issued or lawfully transferees to any person as buyer or owner of the goods and that person transfers the document by way of sale, to a person who takes the document in good faith and for consideration.[Proviso to Section 53(1)].

**B) Right of Stoppage of Goods in Transit**

The right of stoppage of goods means the right of stopping the goods while they are in transit, to regain possession and to retain them till the full price is paid.

Conditions under which right of stoppage in transit can be exercised [Section 50]

**The unpaid seller can exercise the right of stoppage in transit only if the following conditions are fulfilled:**

1. The seller must have parted with the possession of goods,i.e. the goods must not be in the possession of seller.
2. The goods must be in the course of transit.

- The buyer must have become insolvent.

**c) Right of Resale[Section 46(1) and 54]**

**An unpaid seller can resell the goods under the following three circumstance:**

1. Where the goods are of a perishable nature.
2. Where the seller expressly reserves a right of resale if the buyer commits a default in making payment.

- Where the unpaid seller who has exercised his right of lien or stoppage in transit gives a notice to the buyer about his intention to resell an dbuyer does not pay or tender within a reasonable time.

**(II) Rights against the goods where the property in the goods has not passed to the buyer**

**Right of withholding delivery [Section 46(2)]**

Where the property in the goods has not been passed to the buyer, the unpaid seller, cannot exercise right of lien, but get a right of withholding the delivery of goods, similar to and co-extensive with lien and stoppage in transit where the property has passed to the buyer.

**Rights of Unpaid Seller against the Buyer Personally**

The unpaid seller, in addition to his rights against the goods as discussed above, has the following three rights of action against the buyer personally:

1. Suit for price (Sec. 55). Where property in goods has passed to the buyer; or where the sale price is payable 'on a day certain', although the property in goods has not passed; and the buyer wrongfully neglects or refuses to pay the price according to the terms of the contract, the seller is entitled to sue the buyer for price, irrespective of the delivery of goods. Where the goods have not been delivered, the seller would file a suit for price normally when the goods have been manufactured to some special order and thus are unsaleable otherwise.
2. Suit for damages for non-acceptance (Sec. 56). Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The seller's remedy in this case is a suit for damages rather than an action for the full price of the goods.
3. Suit for Interest [Section 61(2)]

In case of breach of the contract on the part of seller, the buyer may sue the seller for interest from the date on which the payment was made.

**Consumer Protection Act: Objectives, Definition**

**The Act tried to protect consumers not only of goods but also of services. Consumers in the Act (Section 2) means any person who:**

**(i)** buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any user of such goods other than the person who buyes such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

**(ii)** hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

**The definition has clarified following:**

1. The Act applies both to goods and services.
2. The provisions of the Act are applicable even when part payment has been made and rest is promised to be paid later.

3. The Act protects not only buyer but user in the case of goods and any beneficiary in case of services.

   As Act has covered both goods and services the defect and deficiencies have elaborately been defined. Defect which is in relation to goods "means any defaults, imperfection or short coming in the quality, quantity, potency, purity or standards which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by trader in any manner what so ever in relation to any goods; Deficiency related to service "means any faults, imperfection, short coming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaking to be performed by a person in pursuance of a contract or otherwise in relation to any services".

   Under the deficiency clause many medical practitioners, insurance companies have been penalized for deficient services and forced them to provide better service in future.

   The coverage of services is very wide and it includes "services of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, "board or lodging or both, housing construction, entertainment, amusement or the surveyance of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service".

   Though the term service includes a large number of services it has not mentioned educational service (which has become very much commercialized and large number of students are virtually cheated by misrepresentation, but consultancy is included in the definition of services).

   The dispute can arise for unfair and restrictive trade practices also, hence they have also been defined in the Act. The restrictive trade practices "means any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be services as a condition precedent for buying, hiring or availing of other goods or services".

   It in simple words means that if one buys goods or service and asked to buy some other good or service also as a precondition of a deal it is restrictive trade practice and is not permitted.

**Objectives of the Consumer Protection Act of 1986**

Discussed below are some of the major objectives and aims for the establishment of the Consumer Protection Act of 1986.

1. Better protection of the interests or all consumers of any goods or services unless the governments specifically exempt.
2. Establishment of consumer councils like the Central and State Consumer Protection Councils and the District Forum.
3. Provision of better quality dispute redressal agencies that can help solve any dispute that arises between consumers and companies.
4. Protection of the consumer rights.
5. Protect consumers from exploitations or mistreatments.

6. Ensure qualitative and effective consumer education. Consumers should be aware of their rights, their options and the solutions available at their disposal.
7. An efficient platform for filing complaints of the consumers and solving the same.
8. Attempting to provide a quality life for consumers.
9. Teaching consumers and brands to live by ethical obligations and also gain genuine public support.

**Consumer Rights**

In order for ensuring consumer protection, it is essential that every consumer know the basics of consumer protection. Discussed below are the fundamental consumer rights.

- **The right to be heard**

  Every consumer has the right to be heard after being exploited. An upset consumer should be aware that he/she possesses the right to take the matter to the authorities if the company does not hear them out. The right to be heard is a powerful right at the disposal of the consumer.

- **The right to seek redressal**

  Every consumer has the right to seek out for justice. Upset consumers who have been a victim of corporate exploitations can take the matter to the redressal agencies and file a suit against the insensitive company. This right is often put to ill use by many consumers and is hence a very delicate right.

- **The right to information**

  Every consumer has the right to information. Consumers should be amidst truthful and genuine information. Information should not have an ill purpose and should not be incorrect. In other words, consumers have the right to truthful information.

- **The right to protection**

  Every consumer has the right to protection. Central Consumer Protection Council, State Consumer Protection Council, District Forum and Consumer Protection Redressal Agencies are at the disposal of the consumers. These institutions aim at protecting Indian consumers from exploitative companies.

- **The right to assurance**

  Every consumer has the right to assurance. Assurance of qualitative goods and qualitative services. They also have the right to the assurance of the variety of commodities and services at their disposal.

- **The right to consumer education**

  Every consumer also has the right to receive consumer education. This education is often a part of every consumer protection act and amendment. The government should make immense effort to share and spread the consumer rights to every remote area of India.

Consumers should also receive the right to get the education on the consumer do's and consumer don'ts. This is a very informative and knowledgeable right at the disposal of the consumers.

- **The right to a healthy environment**

Every consumer has the right to be amidst a clean and healthy environment. Consumers have the right to purchase goods and services in a clean environment free from hassles and pressure. The consumer should not permit intense influence of any vendor because he/she is entitled to decide independently

**Consumer Protection Council and State Consumer Protection Council**

**The Consumer Protection Act, 1986** sought to provide better protection to the interests of the consumers and for that purpose made provisions for the establishment of Consumer Protection Councils and other authorities for resolving consumers' disputes. The Consumer Protection Councils would be set up at national and state levels (Section 6 of Consumer Protection Act)

**The objects of the Central Consumers Protection Council and State Consumers Protection Councils are to promote and protect the rights of the consumers, such as:**

**(a)** The right to be protected against marketing of goods and services which are hazardous to life and property.

**(b)** The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services as the case may be so as to protect the consumer against unfair trade practices.

**(c)** The right to be assured wherever possible, access to a variety of goods and services at **competitive prices**.

**(d)** The right to be heard and to be assured that consumers' interest will receive due consideration at appropriate forum.

**(e)** The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers, and

**(f)** The right to consumer education.

**The objects of a State Consumer Protection Council are to promote and protect within the state the rights of the consumers.**

The objects of the Central Consumer Protection Council are to promote and protect the rights of the Indian consumers in general within the territory of India. The Central Council is the highest body to lie down and decide the policy of consumer protection. Consumers' interests mainly concern with

**(i)** Good quality of goods and services.

**(ii)** Regular and uninterrupted supply of products; and

**(iii)** Reasonable prices of the products.

Composition and Functions of the Councils:

*Central Council (Sec. 4):*

**The Central Council will be composed of following members:**

1. The Minister in charge of Consumer Affairs of the union government will be the chairperson of the Council.
2. Such members official and non-official representing such interests as may be prescribed.

The Central Council meets as and when necessary. At least one meeting shall be held every year. The time and place of the meeting will be fixed by the Chairman. The procedure in regard to the transactions of the business shall also be determined by the Chairman. (Sec 5).

*State Council (Sec. 7):*

**A State Council shall be composed of the following members, namely,**

1. The Minister in charge of Consumer Affairs of the state government will act as Chairman.
2. Such members official and non-official representing such interests as may be prescribed by the state government.

The State Council shall meet as and when necessary. The time and place of the meeting shall be fixed by the Chairman. The Council shall observe such procedure regard to the transactions of its business as may be prescribed by the state government. At least two meetings shall be held every year.

**State Council**

1. The Stats Consumer Protection Council is known as "the State Council."
2. Sections 7 and 8 of Chapter-II explain the provisions explain about the constitution and objects of the State Council. Each State is authorized by its State Consumer Protection Rules to establish one State Council for its territory.
3. The objects of State Council are to promote consumer movement and to safe guard the consumer rights in a State. It is only recommendatory body.
4. The decisions of the State Council are recommendatory in nature.
5. It is purely administrative authority, filled up by the non-official and official members. It functions as a Government department.
6. From the decisions of State Council, no appeal can be filed. Only an application may be made to the Central Council for consideration. The Central Council too does not possess the implementing powers of any decisions of its or of any State Councils.
7. Working Hours and Working Days are not prescribed by the Act. The State Council shall have to conduct its meeting not less than two meetings in every year.

**State Commission**

1. Consumer Disputes Redressal Commission is known as “the State Commission.”
2. Sections 16 to 19 of Chapter-III of the Act explain the provisions about the composition, jurisdiction, procedure, vacancies, appeals etc., of the State Commission. Each State is authorized by its State Consumer Protection Rules to establish one State Commission for its territory.
3. The objects of State Commission are to protect the consumers’ rights by redressing. It is a redressal agency.
4. The decisions of the State Commission are just like the judgments of High Court. They are legal remedies to the aggrieved consumers. The decisions should be implemented. The persons who violate the decisions are liable under contempt of court proceedings.
5. It is a quasi-judicial authority, filled up by judicial and non-official members. Its decisions are binding on District Consumer Forums. They have the power of precedent.
6. The State Commission has appellate powers. It can hear the appeals from the District Consumer Forums. Moreover, the aggrieved party from the decisions of the State Commission can appeal to the National Commission.
7. The State Commission shall have the working hours and working days just like as a State Government Department and a court.

# UNIT-5

**The Information Technology Act, 2000- Definition/Intro**

Salient Features of I.T Act

The salient features of the I.T Act are as follows:

- Digital signature has been replaced with electronic signature to make it a more technology neutral act.
- It elaborates on offenses, penalties, and breaches.
- It outlines the Justice Dispensation Systems for cyber-crimes.
- It defines in a new section that cyber café is any facility from where the access to the internet is offered by any person in the ordinary course of business to the members of the public.
- It provides for the constitution of the Cyber Regulations Advisory Committee.
- It is based on The Indian Penal Code, 1860, The Indian Evidence Act, 1872, The Bankers' Books Evidence Act, 1891, The Reserve Bank of India Act, 1934, etc.
- It adds a provision to Section 81, which states that the provisions of the Act shall have overriding effect. The provision states that nothing contained in the Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957.

Scheme of I.T Act

The following points define the scheme of the I.T. Act:

- The I.T. Act contains **13 chapters** and **90 sections**.
- The last four sections namely sections 91 to 94 in the I.T. Act 2000 deals with the amendments to the Indian Penal Code 1860, The Indian Evidence Act 1872, The Bankers' Books Evidence Act 1891 and the Reserve Bank of India Act 1934 were deleted.
- It commences with Preliminary aspect in Chapter 1, which deals with the short, title, extent, commencement and application of the Act in Section 1. Section 2 provides Definition.
- Chapter 2 deals with the authentication of electronic records, digital signatures, electronic signatures, etc.
- Chapter 11 deals with offences and penalties. A series of offences have been provided along with punishment in this part of The Act.
- Thereafter the provisions about due diligence, role of intermediaries and some miscellaneous provisions are been stated.
- The Act is embedded with two schedules. The First Schedule deals with Documents or Transactions to which the Act shall not apply. The Second Schedule deals with electronic signature or electronic authentication technique and procedure. The Third and Fourth Schedule are omitted.

Application of the I.T Act

As per the sub clause (4) of Section 1, nothing in this Act shall apply to documents or transactions specified in First Schedule. Following are the documents or transactions to which the Act shall not apply −

- **Negotiable Instrument**(Other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881;
- A **power-of-attorney** as defined in section 1A of the Powers-of-Attorney Act, 1882;
- A **trust**as defined in section 3 of the Indian Trusts Act, 1882;
- A **will** as defined in clause (h) of section 2 of the Indian Succession Act, 1925 including any other testamentary disposition;
- Any **contract** for the sale or conveyance of immovable property or any interest in such property;
- Any such class of documents or transactions as may be notified by the Central Government.

Amendments Brought in the I.T Act

The I.T. Act has brought amendment in four statutes vide section 91-94. These changes have been provided in schedule 1-4.

- The first schedule contains the amendments in the Penal Code. It has widened the scope of the term "document" to bring within its ambit electronic documents.
- The second schedule deals with amendments to the India Evidence Act. It pertains to the inclusion of electronic document in the definition of evidence.
- The third schedule amends the Banker's Books Evidence Act. This amendment brings about change in the definition of "Banker's-book". It includes printouts of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device. Similar change has been brought about in the expression "Certified-copy" to include such printouts within its purview.
- The fourth schedule amends the Reserve Bank of India Act. It pertains to the regulation of fund transfer through electronic means between the banks or between the banks and other financial institution.

Intermediary Liability

Intermediary, dealing with any specific electronic records, is a person who on behalf of another person accepts, stores or transmits that record or provides any service with respect to that record.

According to the above mentioned definition, it includes the following:

- Telecom service providers
- Network service providers
- Internet service providers
- Web-hosting service providers
- Search engines
- Online payment sites
- Online auction sites
- Online market places and cyber cafes

Highlights of the Amended Act

The newly amended act came with following highlights:

- It stresses on privacy issues and highlights information security.
- It elaborates Digital Signature.

- It clarifies rational security practices for corporate.
- It focuses on the role of Intermediaries.
- New faces of Cyber Crime were added.

Digital Signature

**Digital Signature**

A digital signature is a technique to validate the legitimacy of a digital message or a document. A valid digital signature provides the surety to the recipient that the message was generated by a known sender, such that the sender cannot deny having sent the message. Digital signatures are mostly used for software distribution, financial transactions, and in other cases where there is a risk of forgery.

**Electronic Signature**

An electronic signature or e-signature, indicates either that a person who demands to have created a message is the one who created it.

A signature can be defined as a schematic script related with a person. A signature on a document is a sign that the person accepts the purposes recorded in the document. In many engineering companies digital seals are also required for another layer of authentication and security. Digital seals and signatures are same as handwritten signatures and stamped seals.

Digital Signature to Electronic Signature

**Digital Signature** was the term defined in the old I.T. Act, 2000. **Electronic Signature** is the term defined by the amended act (I.T. Act, 2008). The concept of Electronic Signature is broader than Digital Signature. Section 3 of the Act delivers for the verification of Electronic Records by affixing Digital Signature.

As per the amendment, verification of electronic record by electronic signature or electronic authentication technique shall be considered reliable.

According to the **United Nations Commission on International Trade Law (UNCITRAL),** electronic authentication and signature methods may be classified into the following categories −

- Those based on the knowledge of the user or the recipient, i.e., passwords, personal identification numbers (PINs), etc.
- Those bases on the physical features of the user, i.e., biometrics.
- Those based on the possession of an object by the user, i.e., codes or other information stored on a magnetic card.
- Types of authentication and signature methods that, without falling under any of the above categories might also be used to indicate the originator of an electronic communication (Such as a facsimile of a handwritten signature, or a name typed at the bottom of an electronic message).

According to the UNCITRAL MODEL LAW on Electronic Signatures, the following technologies are presently in use −

- Digital Signature within a public key infrastructure (PKI)
- Biometric Device
- PINs
- Passwords
- Scanned handwritten signature
- Signature by Digital Pen
- Clickable "OK" or "I Accept" or "I Agree" click boxes

**Electronic Governance**

**According to the World Bank, E-Governance** is when government agencies use information and communication technologies to transform relations with citizens, businesses, and other government agencies. One of the prime objectives of the IT Act, 2000 is the promotion of electronic governance. In this article, we will talk about electronic records and e-governance.

In the IT Act, 2000, there are special provisions under Chapter III to grant legal recognition to electronic records, signature, and also encourage the government and its agencies to use them.

Provisions for e-governance under the IT Act, 2000

These are the provisions under the IT Act, 2000 in the context of e-governance:

1. Legal Recognition of Electronic Records (Section 4)

Let's say that a certain law requires a matter written, typewritten, or printed. Even in the case of such a law, the requirement is satisfied if the information is rendered or made available in an electronic form and also accessible for subsequent reference.

2. Legal recognition of digital signatures (Section 5)

Let's say that the law requires a person's signature to authenticate some information or a document. Notwithstanding anything contained in such law, if the person authenticates it with a digital signature in a manner that the Central Government prescribes, then he satisfies the requirement of the law.

For the purpose of understanding this, signature means a person affixing his handwritten signature or a similar mark on the document.

3. Use of electronic records and digital signatures in Government and its agencies (Section 6)

(1) If any law provides for:

1. the filing of a form, application, or any document with any Government-owned or controlled office, agency, body, or authority
2. the grant or issue of any license, sanction, permit or approval in a particular manner
3. also, the receipt or payment of money in a certain way

Then, notwithstanding anything contained in any other law in force such filing, grant, issue, payment, or receipt is satisfied even if the person does it in an electronic form. The person needs to ensure that he follows the Government-approved format.

(2) With respect to the sub-section (1), may prescribe:

1. the format and manner of filing, creating or issuing such electronic records
2. also, the manner and method of payment of any fees or charges for filing, creating or issuing any such records

4. Retention of electronic records (Section 7)

(1) Let's say that the law requires the retention of certain records, documents or information for a specific period. In such cases, the requirement is also satisfied if the retention is in an electronic form, provided:

1. the information contained therein is accessible and also usable for a subsequent reference.
2. the format of the electronic record is the same as the one originally created, received or sent. Even if the format is changed, then it must accurately represent the original information.
3. the electronic record contains details to facilitate the identification of the origin, destination, and also the date and time of the dispatch or receipt of the record.

This is provided that the clause does not apply to any information which is automatically generated primarily for the purpose of enabling an electronic record for dispatch or receipt.

(2) Nothing in this section applies to any law which expressly provides for the retention of records, documents or information electronically.

5.Publication of rules, regulations, etc., in Electronic Gazette (Section 8)

Let's say that law requires the publishing of official regulation, rule, by-law, notification or any other matter in the Official Gazette. In such cases, the requirement is also satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette.

However, the date of publication of the rule, regulation, by-law, notification or any other matter is the date of the Gazette first published in any form – Official or Electronic.

6. Section 6,7 and 8 do not confer a right to insist document should be accepted in Electronic form (Section 9)

It is important to note that, nothing contained in Sections 6, 7, and 8 confer a right upon any person to insist either the acceptance, issuance, creation or also retention of any document or a monetary transaction in the electronic form from:

- Ministry or Department of the Central/State Government
- Also, any authority or body established under any law by the State/Central Government

7. Power to make rules by Central Government in respect of digital signature (Section 10)

The IT Act, 2000 empowers the Central Government to prescribe:

- Type of digital signature
- Also, the manner and format of affixing the digital signature
- Procedures which facilitate the identification of the person affixing the digital signature
- Control processes and procedures to ensure the integrity, security, and confidentiality of electronic payments or records
- Further, any other matter which is legally important for digital signatures

Data Protection

Section 43A of the Information Technology Act, 2000:

Let's say that a body corporate which possesses, deals or handles any sensitive personal data or information in a computer resource which it owns, controls or operates, is certainly negligent in implementing and maintaining reasonable security practices and procedures leading to a wrongful loss or gain to a person.

In such cases, the body corporate is liable to pay damages by way of compensation. Further, these damages cannot exceed five crore rupees.

Further, the Government of India notified the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, under section 43A of the IT Act, 2000. These rules specifically pertain to sensitive personal information or data and are applicable to all body corporate within India.

**Attribution, Acknowledgment and Dispatch of Electronic Records**

**Attribution of electronic records (Section 11)**

The word attribution means, "The act of establishing a particular person as the creator of a work of art. 2. Something, such as a quality or characteristic that is related to a particular possessor."

With respect to IT At 2000, attribution of electronic records means fixing identity of sender and receiver. Here originator is a person who sends or generates any electronic record. The receiver of electronic record is termed as Addressee. For example if 'A' sends an email to 'B', then 'A' is a sender or originator and 'B' is Addressee. In normal course of communication (postal communication or paper communication), it's very easy to identify originator and addressee but in electronic communication it's not the same.

The electronic record can be sent by the originator himself or by the person who has been authorized by the originator or by an information system that the originator has authenticated.

**Acknowledgment of receiving of electronic record (Section12)**

If the originator has not specified any specific mode of acknowledgement (an act by the addressee that he/she has received the electronic record), the acknowledgement can be given

by a return mail by the addressee or an automated response by the addressee or an act by addressee that shows the acknowledgement.

For example when a person receives an email by an estate agent, for real estate properties, the person can send a thank u mail or can send an automatic reply or can show interest in the offer given by the agent by visiting him. All the three option show an acknowledgement.

If the originator has specified a format and time period for sending the acknowledgement, then the addressee must send the acknowledgement in that format and within the given time period otherwise the originator can send a notice to the addressee stating that no acknowledgement was received.

**Dispatch of Electronic Record(Section 13)**

This section states that when a person sends an electronic record from his computer then that particular time becomes the time of dispatch. For example if Mr. A composes an email at 3.30 am and presses the "Send" button at 4.30 am then time of dispatch will be 4.30 am. because after pressing send button the sender cannot make any changes to the record.

**Sense Electronic Records and Sense Digital Signatures**

**Secure Electronic Record**

Where any security procedure has been applied to an electronic record at a specific point of time. Then such record shall be deemed to be a secure electronic record from such point of time to the time of verification.

**Secure Digital Signature**

If, by application of a security procedure agreed to by the parties concerned, it can be verified that a digital signature, at the time it was affixed, was-

- Unique to the subscriber affixing it.
- Capable of identifying such subscriber.
- Created in a manner or using a means under the exclusive control of the subscriber and is linked to the electronic record to which it relates in such a manner that if the electronic record was altered the digital signature would be invalidated.

Then such digital signature shall be deemed to be a secure digital signature.

**Security Procedure**

The Central Government shall for the purposes of this Act prescribe the security procedure having regard to commercial circumstances prevailing at the time when the procedure was used, including-

- The nature of the transaction.
- The level of sophistication of the parties with reference to their technological capacity.

- The volume of similar transactions engaged in by other parties.
- The availability of alternatives offered to but rejected by any party.
- The cost of alternative procedures, and
- The procedures in general use for similar types of transactions or communications.

**Regulation of Certifying Authorities**

The Information Technology Act, 2000 has established a Certifying Authority to regulate the electronic transactions.

**IT Act, 2000: Regulation of Certifying Authorities**

The following sections pertain to the regulation of certifying authorities:

**1. Section 17: Appointment of the Controller and other officers**

- The Central Government may appoint a Controller of Certifying Authorities after notifying the Official Gazette. They may also appoint Deputy Controllers and Assistant Controllers as it deems fit.
- The Controller discharges his responsibilities subject to the general control and also directions of the Central Government
- The Deputy Controllers and Assistant Controllers shall perform the functions assigned to them by the Controller under the general superintendence and also control of the Controller.
- The qualifications, experience and terms and conditions of service of Controller, Deputy Controllers, and Assistant Controllers shall be such as may be prescribed by the Central Government.
- The Head Office and Branch Office of the office of the Controller shall be at such places as the Central Government may specify, and these may be established at such places as the Central Government may think fit.
- There shall be a seal of the Office of the Controller.

**2. Functions of Controller (Section 18)**

A Controller performs some or all of the following functions:

- Supervise the activities of the Certifying Authorities and also certify their public keys
- Lay down the standards that the Certifying Authorities follow
- Specify the following:

1. qualifications and also experience requirements of the employees of all Certifying Authorities
2. conditions that the Certifying Authorities must follow for conducting business
3. the content of the printed, written, and also visual materials and advertisements in respect of the digital signature and the public key
4. the form and content of a digital signature certificate and the key
5. the form and manner in which the Certifying Authorities maintain accounts
6. terms and conditions for the appointment of auditors and their remuneration

- Facilitate the Certifying Authority to establish an electronic system, either solely or jointly with other Certifying Authorities and its regulation
- Specify the manner in which the Certifying Authorities deal with the subscribers
- Resolve any conflict of interests between the Certifying Authorities and the subscribers

- Lay down the duties of the Certifying Authorities
- Maintain a database containing the disclosure record of every Certifying Authority with all the details as per regulations. Further, this database is accessible to the public.

**3. Recognition of Foreign Certifying Authority (Section 19)**

- A Controller has the right to recognize any foreign certifying authority as a certifying authority for the purpose of the IT Act, 2000. While this is subject to the conditions and restrictions which the regulations specify, the Controller can recognize it with the previous approval of the Central Government and notify in the Official Gazette.
- If a controller recognizes a Certifying Authority under sub-section (i), then its digital signature certificate is also valid for the purpose of the Act.
- If the controller feels that any certifying authority has contravened any conditions or restrictions of recognition under sub-section (i), then he can revoke the recognition. However, he needs to record the reason in writing and notify in the Official Gazette.

**4. Controller to act as a repository (Section 20)**

- The Controller will act as a repository of all digital signature certificates under this Act.
- The Controller will –

1. Make use of secure hardware, software, and also procedures.
2. Observe the standards that the Central Government prescribes to ensure the secrecy and also the security of the digital signatures.

- The Controller will maintain a computerized database of all public keys. Further, he must ensure that the public keys and the database are available to any member of the public.

**5. License to issue Digital Signature Certificates (Section 21)**

- Subject to the provisions of sub-section (2), any person can apply to the Controller for a license to issue digital signature certificates.
- A Controller can issue a license under sub-section (1) only if the applicant fulfills all the requirements. The Central Government specifies requirements with respect to qualification, expertise, manpower, financial resources, and also infrastructure facilities for the issuance of digital signature certificates.
- A license granted under this section is –

(a) Valid for the period that the Central Government specifies

(b) Not transferable or inheritable

(c) Subject to the terms and conditions that the regulations specify

**6. Power to investigate contraventions (Section 28)**

- The Controller or any other Officer that he authorizes will investigate any contravention of the provisions, rules or regulations of the Act.
- The Controller or any other Officer that he authorizes will also exercise the powers conferred on Income-tax authorities under Chapter XIII of the Income Tax Act, 1961. Also, the exercise of powers will be limited according to the Act.

**Digital Signature Certificates**

**A Digital Signature Certificate** is a secure digital key that is issued by the certifying authorities for the purpose of validating and certifying the identity of the person holding this certificate. Digital Signatures make use of the public key encryptions to create the signatures.

A digital signature certificate (DSC) contains information about the user's name, pin code, country, email address, date of issuance of certificate and name of the certifying authority.

Certificates are helpful in authenticating the personal information details of the individual holder when conducting business online.

**Reduced cost and time:** Instead of signing the hard copy documents physically and scanning them to send them via e-mail, you can digitally sign the PDF files and send them much more quickly.

The Digital Signature certificate holder does not have to be physically present to conduct or authorize a business

**Data integrity:** Documents that are signed digitally cannot be altered or edited after signing, which makes the data safe and secure.

The government agencies often ask for these certificates to cross-check and verify the business transaction.

**Authenticity of documents:** Digitally signed documents give confidence to the receiver to be assured of the signer's authenticity. They can take action on the basis of such documents without getting worried about the documents being forged.

**Fulfilling Statutory Compliances**

Individuals and entities who are required to get their accounts audited have to file their income tax return compulsorily using a digital signature. Furthermore, the Ministry of Corporate Affairs has made it mandatory for companies to file all reports, applications, and forms using a digital signature only.

Under GST also, a company can get registered only by verifying the GST application through a digital signature. The use of a digital signature is necessary even for filing all applications, amendments and other related forms.

**Certifying Authorities for Digital Signature Certificate**

The Controller of Certifying Authority for the purpose of issuing digital signatures in India has authorized eMudhra as one of the certifying authority for issuance of Digital Signature Certificate.

Other certifying authorities may include (n) Code Solutions, National Informatics Centre, Safescrypt and Institute for Development and Research in Banking Technology.

**Classes of DSC**

The type of applicant and the purpose for which the Digital Signature Certificate is obtained defines the kind of DSC one must apply for depending on the need. There are three types of Digital Signature certificates issued by the certifying authorities.

**Class 1 Certificates:** These are issued to individual/private subscribers and are used to confirm that the user's name and email contact details from the clearly defined subject lie within the database of the certifying authority.

**Class 2 Certificates:** These are issued to the director/signatory authorities of the companies for the purpose of e-filing with the Registrar of Companies (ROC). Class 2 certificate is mandatory for individuals who have to sign manual documents while filing of returns with the ROC.

**Class 3 Certificates:** These certificates are used in online participation/bidding in e-auctions and online tenders anywhere in India. The vendors who wish to participate in the online tenders must have a Class 3 digital signature certificate.

**Points to Remember**

- Digital signatures are issued for 1 or 2 years. After their validity has expired, they need to be renewed
- A person can have different DSCs – one for official purpose and the other DSC for personal purpose
- Digitally signed documents are acceptable in legal courts as an evidence or proof

**Duties of Subscribers**

1. **Generating key pair**

Where any Digital Signature Certificate, the public key of which corresponds to the private key of that subscriber which is to be listed in the Digital Signature Certificate has been accepted by a subscriber, then, the subscriber shall generate the key pair by applying the security procedure.

**2. Acceptance of Digital Signature Certificate**

(1) A subscriber shall be deemed to have accepted a Digital Signature Certificate if he publishes or authorises the publication of a Digital Signature Certificate-(a) to one or more persons;

(b) in a repository, or otherwise demonstrates his approval of the Digital Signature Certificate in any manner,

(2) By accepting a Digital Signature the subscriber certifies to all who reasonable rely on the information contained in the Digital Signature Certificate that-

(a) the subscriber holds the private key corresponding to the public key listed in the Digital Signature Certificate and is entitled to hold the same;

(b) all representations made by the subscriber to the Certifying Authority and all material relevant to the information contained in the Digital Signature Certificate are true.;

(c) all information in the Digital Signature Certificate that is within the knowledge of the subscriber is true.

3. **Control of private key**

(1) Every subscriber shall exercise shall exercise reasonable care to retain control of the private key corresponding to the public key listed in his Digital Signature Certificate and take all steps to prevent its disclosure to a person not authorised to affix the digital signature of the subscriber.

(2) If the private key corresponding to the public key listed in the Digital Signature Certificate has been compromised, then, the subscriber shall communicate the same without and delay to the Certifying Authority in such manner as may be specified by the regulations.

Explanation- For the removal of doubts, it is hereby declared that the subscriber shall be liable to till he has informed the Certifying Authority that the private key has been compromised.

**Penalties and Offences**

The faster world-wide connectivity has developed numerous online crimes and these increased offences led to the need of laws for protection. In order to keep in stride with the changing generation, the Indian Parliament passed the Information Technology Act 2000 that has been conceptualized on the United Nations Commissions on International Trade Law (UNCITRAL) Model Law.

The law defines the offenses in a detailed manner along with the penalties for each category of offence.

Offences

Cyber offences are the illegitimate actions, which are carried out in a classy manner where either the computer is the tool or target or both.

Cyber-crime usually includes the following:

- Unauthorized access of the computers
- Data diddling

- Virus/worms attack
- Theft of computer system
- Hacking
- Denial of attacks
- Logic bombs
- Trojan attacks
- Internet time theft
- Web jacking
- Email bombing
- Salami attacks
- Physically damaging computer system.

The offences included in the I.T. Act 2000 are as follows:

- Tampering with the computer source documents.
- Hacking with computer system.
- Publishing of information which is obscene in electronic form.
- Power of Controller to give directions.
- Directions of Controller to a subscriber to extend facilities to decrypt information.
- Protected system.
- Penalty for misrepresentation.
- Penalty for breach of confidentiality and privacy.
- Penalty for publishing Digital Signature Certificate false in certain particulars.
- Publication for fraudulent purpose.
- Act to apply for offence or contravention committed outside India Confiscation.
- Penalties or confiscation not to interfere with other punishments.
- Power to investigate offences.

**Example**

**Offences Under The It Act 2000**

**Section 65. Tampering with computer source documents**

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer program, computer system or computer network, when the computer source code is required to be kept or maintained by law for the being time in force, shall be punishable with imprisonment up to three year, or with fine which may extend up to two lakh rupees, or with both.

Explanation − For the purpose of this section "computer source code" means the listing of programs, computer commands, design and layout and program analysis of computer resource in any form.

Object − The object of the section is to protect the "intellectual property" invested in the computer. It is an attempt to protect the computer source documents (codes) beyond what is available under the Copyright Law

Essential ingredients of the section

- knowingly or intentionally concealing
- knowingly or intentionally destroying
- knowingly or intentionally altering
- knowingly or intentionally causing others to conceal
- knowingly or intentionally causing another to destroy
- knowingly or intentionally causing another to alter.

This section extends towards the Copyright Act and helps the companies to protect their source code of their programs.

Penalties − Section 65 is tried by any magistrate.

This is cognizable and non-bailable offence.

Penalties − Imprisonment up to 3 years and / or

Fine − Two lakh rupees.

The following table shows the offence and penalties against all the mentioned sections of the I.T. Act −

| Section | Offence | Punishment | Bailability and Congizability |
|---|---|---|---|
| 65 | Tampering with Computer Source Code | Imprisonment up to 3 years or fine up to Rs 2 lakhs | Offence is Bailable, Cognizable and triable by Court of JMFC. |
| 66 | Computer Related Offences | Imprisonment up to 3 years or fine up to Rs 5 lakhs | Offence is Bailable, Cognizable and |
| 66-A | Sending offensive messages through Communication service, etc… | Imprisonment up to 3 years and fine | Offence is Bailable, Cognizable and triable by Court of JMFC |
| 66-B | Dishonestly receiving stolen computer resource or communication device | Imprisonment up to 3 years and/or fine up to Rs. 1 lakh | Offence is Bailable, Cognizable and triable by Court of JMFC |
| 66-C | Identity Theft | Imprisonment of either | Offence is |

| | | description up to 3 years and/or fine up to Rs. 1 lakh | Bailable, Cognizable and triable by Court of JMFC |
|---|---|---|---|
| 66-D | Cheating by Personation by using computer resource | Imprisonment of either description up to 3 years and /or fine up to Rs. 1 lakh | Offence is Bailable, Cognizable and triable by Court of JMFC |
| 66-E | Violation of Privacy | Imprisonment up to 3 years and /or fine up to Rs. 2 lakh | Offence is Bailable, Cognizable and triable by Court of JMFC |
| 66-F | Cyber Terrorism | Imprisonment extend to imprisonment for Life | Offence is Non-Bailable, Cognizable and triable by Court of Sessions |
| 67 | Publishing or transmitting obscene material in electronic form | On first Conviction, imprisonment up to 3 years and/or fine up to Rs. 5 lakh On Subsequent Conviction imprisonment up to 5 years and/or fine up to Rs. 10 lakh | Offence is Bailable, Cognizable and triable by Court of JMFC |
| 67-A | Publishing or transmitting of material containing sexually explicit act, etc… in electronic form | On first Conviction imprisonment up to 5 years and/or fine up to Rs. 10 lakh On Subsequent Conviction imprisonment up to 7 years and/or fine up to Rs. 10 lakh | Offence is Non-Bailable, Cognizable and triable by Court of JMFC |
| 67-B | Publishing or transmitting of material depicting children in sexually explicit act etc., in electronic form | On first Conviction imprisonment of either description up to 5 years and/or fine up to Rs. 10 lakh On Subsequent Conviction imprisonment of either description up to 7 years and/or fine up to Rs. 10 lakh | Offence is Non Bailable, Cognizable and triable by Court of JMFC |
| 67-C | Intermediary intentionally or knowingly contravening the | Imprisonment up to 3 years and fine | Offence is Bailable, |

| | | | |
|---|---|---|---|
| | directions about Preservation and retention of information | | Cognizable. |
| 68 | Failure to comply with the directions given by Controller | Imprisonment up to 2 years and/or fine up to Rs. 1 lakh | Offence is Bailable, Non-Cognizable. |
| 69 | Failure to assist the agency referred to in sub section (3) in regard interception or monitoring or decryption of any information through any computer resource | Imprisonment up to 7 years and fine | Offence is Non-Bailable, Cognizable. |
| 69-A | Failure of the intermediary to comply with the direction issued for blocking for public access of any information through any computer resource | Imprisonment up to 7 years and fine | Offence is Non-Bailable, Cognizable. |
| 69-B | Intermediary who intentionally or knowingly contravenes the provisions of sub-section (2) in regard monitor and collect traffic data or information through any computer resource for cybersecurity | Imprisonment up to 3 years and fine | Offence is Bailable, Cognizable. |
| 70 | Any person who secures access or attempts to secure access to the protected system in contravention of provision of Sec. 70 | Imprisonment of either description up to 10 years and fine | Offence is Non-Bailable, Cognizable. |
| 70-B | Indian Computer Emergency Response Team to serve as national agency for incident response. Any service provider, intermediaries, data centres, etc., who fails to prove the information called for or comply with the direction issued by the ICERT. | Imprisonment up to 1 year and/or fine up to Rs. 1 lakh | Offence is Bailable, Non-Cognizable |
| 71 | Misrepresentation to the Controller to the Certifying Authority | Imprisonment up to 2 years and/ or fine up to Rs. 1 lakh. | Offence is Bailable, Non-Cognizable. |
| 72 | Breach of Confidentiality and privacy | Imprisonment up to 2 years and/or fine up to Rs. 1 lakh. | Offence is Bailable, Non-Cognizable. |
| 72-A | Disclosure of information in | Imprisonment up to 3 | Offence is |

| | breach of lawful contract | years and/or fine up to Rs. 5 lakh. | Cognizable, Bailable |
|---|---|---|---|
| 73 | Publishing electronic Signature Certificate false in certain particulars | Imprisonment up to 2 years and/or fine up to Rs. 1 lakh | Offence is Bailable, Non-Cognizable. |
| 74 | Publication for fraudulent purpose | Imprisonment up to 2 years and/or fine up to Rs. 1 lakh | Offence is Bailable, Non-Cognizable. |

Compounding of Offences

*As per Section 77-A of the I. T. Act, any Court of competent jurisdiction may compound offences, other than offences for which the punishment for life or imprisonment for a term exceeding three years has been provided under the Act.*

No offence shall be compounded if −

- *The accused is, by reason of his previous conviction, is liable to either enhanced punishment or to the punishment of different kind; OR*
- *Offence affects the socio economic conditions of the country; OR*
- *Offence has been committed against a child below the age of 18 years; OR*
- *Offence has been committed against a woman.*

The person alleged of an offence under this Act may file an application for compounding in the Court. The offence will then be pending for trial and the provisions of Sections 265-B and 265-C of Cr. P.C. shall apply.

**The Right to Information Act, 2005 Right to know, Salient features of the Act**

**Right to information** is more or less a universal concept. The concept of Right to know and right to Information, and right to make a demand for certain documents with the public authorities had been dealt with, and have been appraised. The idea that governments withhold information for the public's benefit has become outdated. During the last decade, many countries have enacted legislations on freedom of information, giving their citizens access to governmental information, and thus, opening way to true democracy.

In India, the Official Secrets Act 1923 was enacted to protect the official secrets. The new information law intend to disclose information, replacing the 'culture of secrecy' in administration. It will promote public accountability which is a part of governance. Where the accountability is exposed, the malpractice, mismanagement, abuse of discretion, bribery etc are trimmed down.

The right to Know flows directly from the guarantee of free speech and expression in Art 19(1)a of the Constitution of India. Yet, it requires fair and efficient procedures to make the freedom of information work.

The first and most well-known right to information movement in India was by the Mazdoor Kisan Shakti Sangathan(MKSS) in Rajasthan during the early 1990's. MKSS's struggle for

the access to village accounts and transparency in administration is widely credited and sparked off the right to information movement in India.

The Right to Information Act, 2005 provides the procedure by which the public can make requests for information held by the public authorities. It also provides for the set up of Information Commissions to deal with complaints and appeals arising in the information system. The Act provides for the openness of the governmental activities and to publish regular information. The Act also provides minimal exceptions to the right to information where national security, public order, privacy etc are concerned.

The basic object of the Act is to provide access to information for the common man. And in order to exercise the freedom of speech and expression, a citizen should be informed. Informed citizenry which is the essence of RTI Act is the curator of democracy. The Act is also beneficial to the governments themselves as openness and transparency in the decision-making process assist in developing citizens' trust in government actions and maintaining a civil and democratic society. The transparency and accountability in the public authority shall contain corruption and thus, the government and its various instrumentalities become accountable to the governed, i.e. the citizens.

**The Key Concepts**

- Transparency and accountability in the working of every public authority.
- The right of any citizen of India to request the access to information.
- The obligation of Public authorities to pro-actively make key information to all.
- A responsibility on all sections of life : Citizenry, NGOs, Media

**SALIENT FEATURES OF RIGHT TO INFORMATION ACT, 2005:**

- The term Information includes any mode of information in any form of record, document, e-mail, circular, press release, contract sample or electronic data etc.
- Any citizen (excluding the citizens within J&K) may request information from a 'public authority' (a body of Government or 'instrumentality of State') which is required to reply expeditiously or within thirty days.
- Citizens have a right to: request any information (as defined); take copies of documents; inspect documents, works and records; take certified samples of materials of work; and obtain information in the form of printouts, diskettes, floppies, tapes, video cassettes or in any other electronic mode.
- The Act relaxes the Official Secrets Act of 1889 which was amended in 1923 and various other special laws that restricted information disclosure in India. In other words, the Act explicitly overrides the Official Secrets Act and other laws in force as on 15 June 2005 to the extent of any inconsistency.
- Applicant can obtain Information within 30 days from the date of request in a normal case. In specific circumstances Information can be obtained within 48 hours from time of request. If it is a matter of life or liberty of a person.
- The Act also requires every public authority to computerise their records for wide dissemination and to proactively publish certain categories of information so that the citizens need minimum recourse to request for information formally. The Act, in particular, requires every public authority to publish 16 categories of information. This includes the particulars of its organisation, functions and duties; powers and duties of its officers and employees;

procedure followed in the decision making process; norms set for discharge of its functions; rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; etc.

- The Act enumerates the types of information(s) that are exempted from disclosure.[7]However, these exempted information(s) or those exempted under the Official Secrets Act can be disclosed if public interest in disclosure overweighs the harm to the protected interest.[8] Also, the exempted information(s) would cease to be exempted if 20 years have lapsed after occurrence of the incident to which the information relates.
- Penalty for refusal to receive an application for information or for not providing information is Rs. 250/- per day but the total amount of penalty should not exceed Rs. 25,000/-
- If an applicant is not supplied information within the prescribed time of 30 days or 48 hours, as the case may be, or is not satisfied with the information furnished to him, he may prefer an appeal to the first appellate authority who is an officer senior in rank to the PIO. If still not satisfied the applicant may prefer a second appeal with the Central Information Commission (CIC)/State Information Commission (SIC) within 90 days from the date on which the decision should have been made by the first appellate authority or was actually received by the appellant.

**Obligation of Public Authority, Designation of Public Information officer**

**It shall publish within one hundred and twenty days of the enactment:**

1. The particulars of its organization, functions and duties;
2. The powers and duties of its officers and employees;
3. The procedure followed in its decision making process, including channels of supervision and accountability;
4. The norms set by it for the discharge of its functions;
5. The rules, regulations, instructions, manuals and records used by its employees for discharging its functions;
6. A statement of the categories of the documents held by it or under its control;
7. The particulars of any arrangement that exists for consultation with, or representation by the members of the public, in relation to the formulation of policy or implementation thereof;
8. A statement of the boards, councils, committees and other bodies consisting of two or more persons constituted by it. Additionally, information as to whether the meetings of these are open to the public, or the minutes' of such meetings are accessible to the public;
9. A directory of its officers and employees;
10. The monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;
11. The budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
12. The manner of execution of subsidy programmes, including the amounts allocated and the details and beneficiaries of such programmes;
13. Particulars of recipients of concessions, permits or authorizations granted by it;
14. Details of the information available to, or held by it, reduced in an electronic form;
15. The particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
16. The names, designations and other particulars of the Public Information Officers.[S.4(1)(b)]

**Designation of Public Information officer**

Every public authority shall, within one hundred days of the enactment of this Act, designate as many officers as the Central Public Information Officers or State Public Information Officers, as the case may be, in all administrative units or offices under it as may be necessary to provide information to persons requesting for the information under this Act.

Without prejudice to the provisions of sub-section (1), every public authority shall designate an officer, within one hundred days of the enactment of this Act, at each sub-divisional level or other sub-district level as a Central Assistant Public Information Officer or a State Assistant Public Information Officer, as the case may be, to receive the applications for information or appeals under this Act for forwarding the same forthwith to the Central Public Information Officer or the State Public Information Officer or senior officer specified under sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be:

Provided that where an application for information or appeal is given to a Central Assistant Public Information Officer or a State Assistant Public Information Officer, as the case may be, a period of five days shall be added in computing the period for response specified under sub-section (1) of section 7.

Every Central Public Information Officer or State Public Information Officer, as the case may be, shall deal with requests from persons seeking information and render reasonable assistance to the persons seeking such information.

The Central Public Information Officer or State Public Information Officer, as the case may be, may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his or her duties.

Any officer, whose assistance has been sought under sub-section (4), shall render all assistance to the Central Public Information Officer or State Public Information Officer, as the case may be, seeking his or her assistance and for the purposes of any contravention of the provisions of this Act, such other officer shall be treated as a Central Public Information Officer or State Public Information Officer, as the case may be.

Request for obtaining information, Duties of a PIO, Exemption from disclosure of information, Partial disclosure of information

**Request for obtaining information**

1. A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed, to:

- The Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority;

- The Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, specifying the particulars of the information sought by him or her:

  Provided that where such request cannot be made in writing, the Central Public Information Officer or State Public Information Officer, as the case may be, shall render all reasonable assistance to the person making the request orally to reduce the same in writing.

2. An applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him.
3. Where an application is made to a public authority requesting for an information:

- Which is held by another public authority; or
- the subject matter of which is more closely connected with the functions of another public authority, the public authority, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:

  Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.

**Duties of a PIO**

1. If an information sought by anyone is regarding his life or liberty, such RTI is compulsory to be answered **within a time period of 48 hours** of the receipt of the request.
2. If out of various information sought, only a few are being answered by PIO then, it is the duty of Public Information Officer (PIO) to give a reason for not providing with the complete documents demanded and rights of the applicant with respect to review of the decision regarding non-disclosure of part of the information.
3. On access to information, **the RTI Act empowers citizen with the rights equivalent to a Member of Parliament.** The information which cannot be denied to any Member of Parliament or State legislature cannot be denied to any person seeking RTI.
4. It is the duty of PIO to suo motu (on its own) declare information such as mentioned in the exhaustive list of section 4 of RTI Act.

**Exemption from disclosure of information**

- Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen:

1. information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
2. information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
3. information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
4. information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the

competent authority is satisfied that larger public interest warrants the disclosure of such information;

5. information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
6. information received in confidence from foreign Government;
7. information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
8. information which would impede the process of investigation or apprehension or prosecution of offenders;
9. cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;
10. information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

- Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.
- Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under secton 6 shall be provided to any person making a request under that section: Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

**Partial disclosure of information**

You should remember that it is possible for information to be only partially withheld/released. This might happen where some of the information in the documents requested is sensitive and falls under an exemption, but the remainder is harmless. In such cases, the sensitive information should be removed or blacked out from the record, and the remainder of the information can still be released.

Section 10(1) of the Central Act permits partial disclosure of information. This makes good sense because public officials should only be able to withhold those pieces of information or portions of documents which are specifically covered by an exemption. If a 30 page document contains only 1 page of exempt information, it is not appropriate to withhold the entire document.

Section 10(2) of the Central Act specifies the content of decision notice where information is being only partially disclosed, requiring at a minimum that the requester is information:

- That only part of the record is being provided;
- The reasons for the decision, including any findings on any material questions of fact, referring to the material on which those findings were based;
- The name and designation of the person giving the decision;
- The details of the fees, including calculations;
- Right with respect to review of the decision regarding non-disclosure of part of the information, the amount of the fee or the form of access, including details of the "**appellate authority**", time limits, the process and any forms.

**Information commissions, Powers of Information Commissions**

1. The Central Information Commission/State Information Commission has a duty to receive complaints from any person –

- Who has not been able to submit an information request because a PIO has not been appointed;
- Who has been refused information that was requested;
- Who has received no response to his/her information request within the specified time limits;
- Who thinks the fees charged are unreasonable;
- Who thinks information given is incomplete or false or misleading; and;
- Any other matter relating to obtaining information under this law.

2. Power to order inquiry if there are reasonable grounds.
3. CIC/SCIC will have powers of Civil Court such as –

- Summoning and enforcing attendance of persons, compelling them to give oral or written evidence on oath and to produce documents or things;
- Requiring the discovery and inspection of documents;
- Receiving evidence on affidavit;
- Requisitioning public records or copies from any court or office;
- Issuing summons for examination of witnesses or documents;
- Any other matter which may be prescribed.

4. All records covered by this law (including those covered by exemptions) must be given to CIC/SCIC during inquiry for examination.
5. Power to secure compliance of its decisions from the Public Authority includes-
6. Providing access to information in a particular form;
7. Directing the public authority to appoint a PIO/APIO where none exists;
8. Publishing information or categories of information;
9. Making necessary changes to the practices relating to management, Maintenance and destruction of records;
10. Enhancing training provision for officials on RTI;
11. Seeking an annual report from the public authority on compliance with this law;
12. Require it to compensate for any loss or other detriment suffered by the applicant;
13. Impose penalties under this law; or
14. Reject the application. (S.18 and S.19)

## Appellate Authorities, Penalties, Jurisdiction of courts

### Appellate Authorities

1. **First Appeal:** First appeal to the officer senior in rank to the PIO in the concerned Public Authority within 30 days from the expiry of the prescribed time limit or from the receipt of the decision (delay may be condoned by the Appellate Authority if sufficient cause is shown).
2. **Second Appeal**: Second appeal to the Central Information Commission or the State Information Commission as the case may be, within 90 days of the date on which the decision was given or should have been made by the First Appellate Authority. (delay may be condoned by the Commission if sufficient cause is shown).
3. **Third Party appeal** against PIO's decision must be filed within 30 days before first Appellate Authority; and, within 90 days of the decision on the first appeal, before the appropriate Information Commission which is the second appellate authority.
4. Burden of proving that denial of Information was justified lies with the PIO.
5. First Appeal shall be disposed of within 30 days from the date of its receipt. Period extendable by 15 days if necessary. (S.19)

### Penalties

1. Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

   Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

   Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

2. Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

## Jurisdiction of Courts

Lower Courts are barred from entertaining suits or applications against any order made under this Act. (S.23) However, the writ jurisdiction of the Supreme Court and High Courts under Articles 32 and 225 of the Constitution remains unaffected.